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{SHOW } PROCEEDINGS AND ORDERS DATE: 110785

CASE NBR 85-1-00059 CFX
SHORT TITLE North Side Lumber Co. DOCKETED: Jul 12 1985
VERSUS Block, Sec. of Agric.

Date	Proceedings and Orders
Jul 12 1985	Petition for writ of certiorari filed.
Jul 11 1985	Application for stay filed (A-31).
Jul 12 1985	Opposition to application for stay filed.
Jul 24 1985	Above application for stay denied by Rehnquist, J., with memorandum opinion.
Aug 19 1985	Order extending time to file response to petition until September 13, 1985.
Aug 26 1985	Brief of respondents Block, Sec. of Agriculture, et al. in opposition filed.
Aug 28 1985	DISTRIBUTED. September 30, 1985
Sep 11 1985	REDISTRIBUTED. September 30, 1985
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PROCEEDINGS AND ORDERS DATE: 110785

CASE NBR 85-1-00059 CFX
SHORT TITLE North Side Lumber Co. DOCKETED: Jul 12 1985
VERSUS Block, Sec. of Agric.

Date	Proceedings and Orders
Oct 21 1985	Petition DENIED. Dissenting opinion by Justice White. (Detached opinion.)

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PETITION FOR WRIT OF CERTIORARI

85- 59

No. 85-——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NORTH SIDE LUMBER CO., *et al.*,

Petitioners,

v.

JOHN R. BLOCK, Secretary of the United States Department of Agriculture; R. MAX PETERSON, Chief of the United States Forest Service; JEFF M. SIRMON, Regional Forester for Region VI of the United States Forest Service; and Lane County, Oregon,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Counsel of Record:

GARY G. STEVENS
ALAN I. SALTMAN
THOMAS F. SPAULDING
SALTMAN & STEVENS, P.C.
1612 K St. N.W.
Suite 1000
Washington, D.C. 20006
(202) 887-6760

CARL R. NEIL
MICHAEL E. HAGLUND
LINDSAY, HART, NEIL & WEIGLER
Suite 700
Columbia Square
111 S.W. Columbia
Portland, Oregon 97201
(503) 226-1191

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTION PRESENTED FOR REVIEW

Whether the district court has jurisdiction to issue a declaratory judgment as to the validity under federal common law of several hundred timber sale contracts between petitioners and the Forest Service of the United States Department of Agriculture.

LIST OF PARTIES TO THIS PROCEEDING

Petitioners (listed in Appendix L) are 113 purchasers of national forest timber in Oregon and Washington. Petitioners are members of a class which the district court conditionally certified on February 15, 1984 (order reprinted in Appendix F). Also parties to this proceeding under Sup. Ct. R. 19.6 (although not petitioners herein), are ten publicly-owned companies who were excluded from the conditionally-certified class and who intervened below. Those ten companies are also listed in Appendix L.

Respondents are John R. Block, Secretary of the United States Department of Agriculture, R. Max Peterson, Chief of the United States Forest Service, Jeff M. Sirmon, Regional Forester for Region VI of the United States Forest Service and Lane County, Oregon.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

No. 85 - ——

NORTH SIDE LUMBER CO., *et al.*,

Petitioners,

v.

JOHN R. BLOCK, Secretary of the United States Department of Agriculture; R. MAX PETERSON, Chief of the United States Forest Service; JEFF M. SIRMON, Regional Forester for Region VI of the United States Forest Service; and Lane County, Oregon,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners, 113 holders of timber sale contracts with the Forest Service of the United States Department of Agriculture, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit filed on February 20, 1985.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (reprinted in Appendix A) is reported at 753 F.2d 1482. The opinion of the United

States District Court for the District of Oregon, dated December 23, 1983 (reprinted in Appendix B), is unreported. The district court's orders, dated January 11, 1984, January 26, 1984 and February 15, 1984 (two orders) (reprinted in Appendices C, D, E and F, respectively), are also unreported.

JURISDICTION

The judgment of the Ninth Circuit which is sought to be reviewed (reprinted in Appendix A) is dated February 20, 1985. The order of the Ninth Circuit denying petitioners' timely petition for rehearing and suggestion for rehearing in banc (reprinted in Appendix G) is dated May 29, 1985. The order of the Ninth Circuit staying its mandate for 30 days pending the filing of this petition (reprinted in Appendix H), is dated June 13, 1985.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the Administrative Procedure Act, 5 U.S.C. § 702 (reprinted in Appendix I) and the Tucker Act, 28 U.S.C. §§ 1346 and 1491 (reprinted in Appendices J and K, respectively).

STATEMENT OF THE CASE

This case concerns the validity of several hundred contracts for sale of timber from the national forests in western Oregon and Washington. This timber was sold at oral auctions conducted by the Forest Service of the United States Department of Agriculture (here-

inafter "Forest Service") during the late 1970's and early 1980's. Under the contracts, the purchasers are to cut designated timber in a described sale area before a stated deadline. If the designated timber is not harvested by the termination date of the sales, liability to the government may result. Damages are measured by the difference between the original contract price and the price of the same timber as resold by the Forest Service, plus interest.

During the mid-1970's a new generation of home buyers came of age and began purchasing homes. Inflation and the demand for wood products pushed lumber prices up. Timber companies in Oregon and Washington (traditionally dependent on public timber) were forced to purchase even more timber from government lands in order to meet this new demand. During this time, it also became apparent that newly designated wilderness areas and the Forest Service's program of sustained-yield harvesting would limit the amount of timber available on the market. Studies predicted declines in timber availability beginning in the mid-1980's. Under these conditions it seemed certain that prices would rise, and timber companies began to bid higher prices to insure a share of the necessary timber supply. (App. B at 17a).

In late 1979, by an unexpected shift in its historic policy, the Federal Reserve Board sought to reduce inflationary trends by controlling the money supply. Interest rates rose sharply and the real estate market collapsed. Demand for lumber plummeted and product prices fell precipitously. (*Id.* at 17a-18a).

As a result of these market conditions, on April 5, 1983, North Side Lumber Company (hereinafter

"North Side") filed an action in the United States District Court for the District of Oregon against the Secretary of Agriculture and various Forest Service officials. North Side requested the district court to invalidate 15 of its timber sale contracts pursuant to the doctrine of commercial impracticability. No money judgment was sought. North Side asserted district court jurisdiction under the federal question statute, 28 U.S.C. § 1331, the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, and the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.*

North Side moved for summary judgment and, alternatively, for a preliminary injunction against enforcement of its contracts. The Forest Service cross-moved for summary judgment contending that the district court lacked jurisdiction to resolve this contract question.

On December 23, 1983, the district court issued a decision. In its opinion and order, the district court denied both parties' motions for summary judgment. It held, however, that it had subject matter jurisdiction to grant or deny North Side's requested relief and granted North Side's motion for a preliminary injunction.

On February 1, 1984, North Side filed an amended complaint naming additional plaintiffs and seeking relief for them and others similarly situated—a total of 129 parties—as class members under Fed. R. Civ. P. 23(b)(2) or 23(b)(3). As before, the plaintiffs claimed jurisdiction under the federal question statute, 28 U.S.C. § 1331, the Declaratory Judgment Act, 28 U.S.C. §§ 2201-2202, and the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq.* The plaintiffs alleged

that their timber sale contracts had become commercially impracticable that the five-year "Multi-Sale Extension Program" announced July 27, 1983 (described in App. B at 19a-20a) would be ineffective to remedy the problem, and that injunctive relief was necessary to prevent enforcement of the contracts. Alternatively, they alleged claims based on frustration of purpose and impossibility of performance. The plaintiffs sought a declaration that their Forest Service contracts were void and injunctive relief against their enforcement and against enforcement of the February 15, 1984, deadline for filing extension plans. As before, no monetary relief was sought.

On February 15, 1984, the court conditionally certified a class of 109 (later expanded to 113) companies holding federal timber sale contracts and granted those class members temporary injunctive relief against enforcement of the contracts and the February 15, 1984, deadline for filing extension plans under the "Multi-Sale Extension Program." Those 113 companies are the petitioners in this appeal. The court excluded from the class, however, 11 publicly-owned companies. Appeals to the Ninth Circuit followed from the Forest Service, from 10 of the excluded publicly-owned companies (which the district court had allowed to intervene as plaintiffs) and from Lane County, Oregon (which the district court had allowed to intervene as a defendant).

On February 20, 1985, the United States Court of Appeals for the Ninth Circuit vacated the injunction stating that the district court did not have jurisdiction over the causes of action based on the common law doctrines of commercial impracticability, frustration of purpose and impossibility of performance.

Although the court recognized that petitioners' claims arose under federal law, it concluded those claims were barred by the doctrine of sovereign immunity. In this regard, the court held that the waiver of sovereign immunity contained in the Administrative Procedure Act, 5 U.S.C. § 702, was not available to petitioners inasmuch as the Tucker Act, 28 U.S.C. §§ 1346 and 1491, impliedly forbids relief on those claims.

REASONS FOR GRANTING THE WRIT

This case is of exceptional importance. The question of federal jurisdiction presented in this proceeding is significant and consideration by the Court would be justified solely on grounds of the substantial benefits derived from clarifying this issue and consequently avoiding unnecessary future litigation over this question.

Second, and no less importantly, a decision on petitioners' claims is critical for the class of over one hundred purchasers of federal timber sale contracts represented in this lawsuit. At issue in the legal validity of several hundred contracts, involving an estimated total liability of approximately $1.8 billion. Indeed, the basic economies of the states of Oregon and Washington are at stake in this case. Thus, this case presents questions of exceptional importance and issues of significant public interest.

The Court of Appeals' opinion misapprehends the existing law of sovereign immunity and without basis enunciates a rule that district courts cannot grant equitable relief "in suits on government contracts." (App. A at 6a). The Court of Appeals finds in the Tucker Act "a limitation on the remedies available

in actions on government contracts," (*Id.*), and a congressional "intent not to allow post-award declaratory relief on government contracts . . . ." (*Id.* at 9a). These conclusions are overbroad and ill-founded.

The Court of Appeals' opinion relies heavily on language from *Megapulse, Inc.* v. *Lewis,* 672 F.2d 959, 967-68 (D.C. Cir. 1982), to support its conclusion that the Tucker Act impliedly forbids a waiver of sovereign immunity with respect to petitioners' claims. The relevant discussion in *Megapulse* concerning the remedial limitations of the Tucker Act, however, applies exclusively to claims for *money damages.* As the Court of Appeals recognized, however, petitioners' claims are not for money damages. (App. A at 3a).

Also, the relevant discussion from *Megapulse* is grounded on preserving the integrity of the Court of Claims' jurisdiction. *Megapulse,* 672 F.2d at 967; *International Engineering Co.* v. *Richardson,* 512 F.2d 573, 580 (D.C. Cir. 1975), *cert. denied,* 423 U.S. 1048 (1976); *Warner* v. *Cox,* 487 F.2d 1301, 1306 (5th Cir. 1974). Thus, the *Megapulse* court stated:

> [T]hat to allow suit against the United States under the APA in actions actually based on contract would create such inroads into the restrictions of the Tucker Act that it would ultimately result in the demise of the Court of Claims.

672 F.2d at 967 (footnote omitted). The "inroads" being referred to clearly pertain to district court jurisdiction over contract claims essentially seeking monetary damages. This is apparent from the cases cited: *Kester* v. *Campbell,* 652 F.2d 13 (9th Cir. 1981); *Bakersfield City School District* v. *Boyer,* 610 F.2d

621 (9th Cir. 1979); *Lee* v. *Blumenthal,* 588 F.2d 1281 (9th Cir. 1979); *American Science & Engineering, Inc.* v. *Califano,* 571 F.2d 58 (1st Cir. 1978); *International Engineering,* 512 F.2d 573; *Warner* v. *Cox,* 487 F.2d 1301, 1306 (5th Cir. 1974). In each of these cases, the relief sought was essentially a monetary award. It follows that the "remedial limitations" as they exist under the Tucker Act only apply with respect to district court actions for *money damages.* These limitations have no applicability here in a suit for a declaratory judgment as to the validity of contracts. The jurisdiction of the Claims Court cannot be threatened when such a declaratory judgment is sought in a district court because, as the Court of Appeals correctly noted, the Claims Court does not have jurisdiction to award declaratory relief. (App. A at 6a).

The Court of Appeals also overlooked established law in finding a congressional "intent not to allow post-award declaratory relief on government contracts." (App. A at 9a). This overbroad conclusion is inconsistent with the congressionally-approved practice of allowing the district courts to grant post-award declaratory and injunctive relief regarding government contract bid protests. 28 U.S.C. § 1491(a)(3); H.R. Rep. No. 312, 97th Cong., 1st Sess. 43 (1981); S. Rep. No. 275, 97th Cong., 1st Sess. 23 (1981); *see also Acme of Precision Surgical Co., Inc.* v. *Weinberger,* 580 F. Supp. 490, 499 (E.D. Pa. 1984); *Inter-Con Securities Systems, Inc.* v. *Orr,* 574 F. Supp. 250, 253 (D.D.C. 1983); *Aero Corp.* v. *Department of the Navy,* 558 F. Supp. 404 (D.D.C. 1983); *American District Telegraph* v. *Department of Energy,* 555 F. Supp. 1244 (D.D.C. 1983); *Opal Manufacturing Co., Ltd.* v. *UMC Industries, Inc.,* 553 F. Supp. 131, 133,

n.3 (D.D.C. 1982). Clearly, Congress did not intend to eliminate district court jurisdiction of claims for equitable relief in cases involving contracts with the United States where a federal question arises based on illegal agency action. *United States* v. *John C. Grimberg Co., Inc.,* 702 F.2d 1362, 1374-76 (Fed. Cir. 1983); *B.K. Instrument, Inc.* v. *United States,* 715 F.2d 713, 726 (2d Cir. 1983).

CONCLUSION

For the foregoing reasons, and given the exceptional importance of the issues at stake in this case, this petition for a writ of certiorari should be granted.

Respectfully submitted,

Counsel of Record:
GARY G. STEVENS
ALAN I. SALTMAN
THOMAS F. SPAULDING
SALTMAN & STEVENS, P.C.
1612 K St. N.W.
Suite 1000
Washington, D.C. 20006
(202) 887-6760

CARL R. NEIL
MICHAEL E. HAGLUND
LINDSAY, HART, NEIL & WEIGLER
Suite 700
Columbia Square
111 S.W. Columbia
Portland, Oregon 97201
(503) 226-1191

Counsel for Petitioners

APPENDIX

APPENDIX A

For Publication

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 84-3657 and

84-3660

DC No. CV 83-490 BU

NORTH SIDE LUMBER CO., SUMMIT TIMBER CO., STEVENSON CO-PLY, INC., on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

and

BOHEMIA, INC., MEDFORD CORPORATION, SOUTHWEST FOREST INDUSTRIES, INC., BOISE CASCADE CORPORATION, CROWN ZELLERBACH CORPORATION, GEORGIA-PACIFIC CORPORATION, PENN TIMBER, INC., LOUISIANA-PACIFIC CORPORATION, PUBLISHERS PAPER CO., and WILLAMETTE INDUSTRIES, INC.,

Plaintiffs-Intervenors-Appellees,

v.

JOHN BLOCK, Secretary of the United States Department of Agriculture; R. MAX PETERSON, Chief of the United States Forest Service: JEFF M. SIRMON, Regional Forester for Region VI of the United States Forest Service,

Defendants-Appellants,

and

LANE COUNTY,

Defendant-Intervenor-Appellant.

Nos. 84-3661 and

84-3776

DC No. CV 83-490 BU

NORTH SIDE LUMBER CO., SUMMIT TIMBER CO., STEVENSON CO-PLY, INC., on behalf of themselves and all others similarly situated,

Plaintiffs,

and

BOHEMIA, INC., MEDFORD CORPORATION, SOUTHWEST FOREST INDUSTRIES, INC., BOISE CASCADE CORPORATION, CROWN ZELLERBACH CORPORATION, GEORGIA-PACIFIC CORPORATION, PENN TIMBER, INC., LOUISIANA-PACIFIC CORPORATION, PUBLISHERS PAPER CO., and WILLAMETTE INDUSTRIES, INC.,

Plaintiffs-Intervenors-Appellants,

v.

JOHN BLOCK, Secretary of the United States Department of Agriculture; R. MAX PETERSON, Chief of the United States Forest Service: JEFF M. SIRMON, Regional Forester for Region VI of the United States Forest Service,

Defendants-Appellees,

and

LANE COUNTY,

Defendant-Intervenor-Appellee.

OPINION

[Filed Feb. 20, 1985. Phillip B. Winberry, Clerk, U.S. Court of Appeals]

Appeals from the United States District Court
for the District of Oregon
James M. Burns, Chief Judge, Presiding

Argued and submitted June 15, 1984

Before: FAIRCHILD*, GOODWIN and BOOCHEVER, Circuit Judges

GOODWIN, Circuit Judge

The United States appeals from a preliminary injunction restraining it from enforcing contracts for the sale of national forest timber, and plaintiffs-intervenors appeal their exclusion from the benefits of the injunction. We vacate the injunction because the district court did not have jurisdiction of the cause of action on which it was based.

North Side, the class it represents, and plaintiffs-intervenors are timber companies that have contracts to cut and pay for timber in the national forests in Oregon and Washington.[1] They brought this action against the Secretary of Agriculture and several of his subordinates, asking for a judgment declaring the contracts void and restraining the defendants from enforcing them. They did not seek money damages.

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* The Honorable Thomas E. Fairchild, Senior United States Circuit Judge for the Seventh Circuit, sitting by designation.

[1] We will refer to North Side, its co-plaintiffs, the class they represent, and plaintiffs-intervenors collectively as the timber companies.

Because of a depressed market for lumber and logs, the timber companies can perform their contracts only at a loss. If they do not perform, they will be liable to the government for the difference between the contract price they agreed to pay for the timber and the price the same timber brings when the government resells it to new purchasers, plus interest. Either performance at a loss or default with payment of damages to the government will bankrupt at least some of the timber companies.

The district court preliminarily enjoined the Secretary from enforcing the contracts held by North Side and and the class of 109 privately-held timber companies it represents. Several publicly-held timber companies, the "plaintiffs-intervenors," were permitted to intervene in the action but were excluded from the plaintiff class and from the scope of the injunction. The Secretary and Lane County, which intervened as a defendant to protect its interest in the contracts, appeal from the district court's grant of the preliminary injunction. The plaintiffs-intervenors appeal from the district court's refusal to bring them under the protection of the injunction.

The timber companies make two claims for relief. The first, which we will refer to as the impracticability claim, asserts that contingencies unforeseen at the time the contracts were made render the contracts void under the contract law doctrines of commercial impracticality, frustration of purpose, and impossibility of performance. The second, which we will refer to as the statutory claim, asserts that enforcement of the contracts would violate 16 U.S.C. §§ 473-482 and the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. §§ 528 *et seq.*[2]

---

[2] North Side's original complaint asserted both the statutory and the impracticability theories. After the district court granted the preliminary injunction, North Side amended its complaint to omit the statutory claim. However, some of the plaintiffs-intervenors make this claim in their complaints in intervention.

The timber companies contend that both claims fall within the district court's federal question jurisdiction, 28 U.S.C. § 1331. It is true that the claims arise under federal law as § 1331 requires. The statutory claim obviously involves federal statutes. The impracticability claim also arises under federal law because federal common law of contracts applies to contracts with the federal government, *Saavedra v. Donovan,* 700 F.2d 496, 498 (9th Cir.), *cert. denied,* 104 S.Ct. 236 (1983), and federal common law is part of the "laws . . . of the United States" for the purpose of § 1331 jurisdiction. *Illinois v. Milwaukee,* 406 U.S. 91, 100 (1972).

But the analysis of jurisdiction cannot stop with § 1331, because the claims in this case are in essence against the federal government, and thus are barred by sovereign immunity unless the government has consented to suit.[3] The timber companies contend that the Administrative Procedure Act, 5 U.S.C. § 702, waives the government's sovereign immunity to this action. Section 702 reads in part:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

The waiver of immunity is limited by the proviso of § 702 that

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[3] The Supreme Court treats sovereign immunity not merely as a defense but as a jurisdictional bar: "the existence of consent [to suit] is a prerequisite for jurisdiction." *United States v. Mitchell,* 103 S.Ct. 2961, 2965 (1983). Title 28 U.S.C. § 1331 does not itself waive sovereign immunity. *Kester v. Campbell,* 652 F.2d 13, 15 (9th Cir. 1981), *cert. denied,* 454 U.S. 1146 (1982).

> Nothing herein . . . confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

The Tucker Act, 28 U.S.C. §§ 1346 and 1491, is a "statute that grants consent to suit" on government contracts. We conclude that it impliedly forbids relief on the impracticability claim but not the statutory claim. It thus precludes a § 702 waiver of sovereign immunity on the impracticability claim. Moreover, on the impracticability claim, we have been able to identify from the record in this case no claim of an official action or failure to act within the meaning of 5 U.S.C. § 702. In the absence of such a claim, § 702 does not waive immunity.

The Tucker Act gives the United States Claims Court jurisdiction over "any claim against the United States founded . . . upon any express or implied contract with the United States," 28 U.S.C. § 1491(a)(1); it exercises this jurisdiction concurrently with the district courts for actions claiming less than $10,000. 28 U.S.C. § 1346(a)(2). The Act is more than just a grant of jurisdiction over government contract claims; it is also a limited waiver of sovereign immunity and a limitation on the remedies available in actions on government contracts. *Megapulse, Inc. v. Lewis*, 672 F.2d 959, 967 (D.C. Cir. 1982). The Tucker Act has been construed as permitting the Claims Court to grant money damages against the government in contract actions but not injunctive or declaratory relief. *United States v. King*, 395 U.S. 1 (1969) (Court of Claims may not grant declaratory relief); *United States v. Jones*, 131 U.S. 1 (1889) (Court of Claims may not grant equitable relief).[4]

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[4] *King* and *Jones* dealt with the jurisdiction of the former United States Court of Claims, but the cases are relevant because the Federal Courts Improvement Act of 1982, § 133, Pub. L. 97-164, 96 Stat. 25, 39, vested the newly-created Claims Court with the trial jurisdiction of the former Court of Claims. S. Rep. No. 275, 97th Cong., 1st Sess., 22-23 (1981), reprinted in 1982 U.S. Code Cong. & Ad. News 11, 32-33.

Current law permits the Claims Court to grant declaratory relief in contract claims brought before the contract is awarded, and to grant limited amounts of equitable relief, 28 U.S.C. § 1491(a)(2) & (3), but these provisions do not allow the injunction or the post-award declaratory judgment that plaintiffs seek in this action. *Alford v. United States*, 3 Cl.Ct. 229 (1983); *Public Service Co. v. United States*, 2 Cl.Ct. 380 (1983).

These restrictions on the relief that the Claims Court may grant also limit the relief that the district courts may grant when exercising their concurrent Tucker Act jurisdiction under 28 U.S.C. § 1346(a)(2). *Richardson v. Morris*, 409 U.S. 464 (1973). Thus the Tucker Act "impliedly forbids" declaratory and injunctive relief and precludes a § 702 waiver of sovereign immunity in suits on government contracts. In fact, the legislative history of § 702 specifically mentions the Tucker Act as a statute that "impliedly forbids" relief within the meaning of § 702. H.R. Rep. No. 1656, 94th Cong., 2d Sess. 13, reprinted in 1976 U.S. Code Cong. & Ad. News 6121, 6133.

This court twice has said that the Tucker Act "does not preclude review of agency action when the relief sought is other than money damages." *Laguna Hermosa Corp. v. Martin*, 643 F.2d 1376, 1379 (9th Cir. 1981); *Rowe v. United States*, 633 F.2d 799, 802 (9th Cir. 1980) *cert. denied*, 451 U.S. 970 (1981). Because plaintiffs do not ask for money damages, this statement might seem to indicate that the Tucker Act does not prevent a § 702 waiver in our case. However, we decline to give the statement a broader scope than indicated by the the facts of the cases in which it appears. Both *Laguna Hermosa* and *Rowe* dealt with claims that were contract-related but that rested at bottom on statutory rights. As we read these cases, the plaintiffs' reliance on statutory rights kept their claims from being "founded . . . upon [a] . . . contract with the United States"

within the meaning of the Tucker Act, with the consequence that the Act did not preclude a § 702 waiver of sovereign immunity.[5]

In *Laguna Hermosa*, the plaintiff claimed that a government officials' refusal to honor a contract that the plaintiff had entered into with the government's predecessor in interest violated a federal statute. The plaintiff asked for a declaratory judgment that it had contract rights against the government but apparently did not ask for a declaration of the content of those rights. Rather, it argued that whatever the scope of the contract rights that it had against the government's predecessor in interest, a federal statute compelled the government to recognize them.

In *Rowe*, the court understood the plaintiffs to be claiming that because they had a contract with the government, a federal statute precluded the Secretary of the Interior from awarding a lease to others. Plaintiffs accordingly asked the court to compel the Secretary to award them the lease. The *Rowe* plaintiffs were thus seeking to enforce statutory rights, not contractual ones.

Our reading of *Laguna Hermosa* and *Rowe* leads us to conclude that the Tucker Act does not impliedly forbid relief on the statutory claim and thus does not preclude a § 702 waiver of sovereign immunity on that claim. Like the claims in *Laguna Hermosa* and *Rowe*, the statutory claim does not seek a declaration of contract rights against the government. Rather, it asks for a declaration that, whatever the content of those rights, federal statutes preclude the government from enforcing them.

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[5] However, even invocation of a statutory right will not permit a plaintiff to escape the Tucker Act's exclusive jurisdiction and its preclusion of a § 702 waiver of sovereign immunity if the relief that the plaintiff seeks would have the actual effect of money damages. *Rowe v. United States*, 633 F.2d 799, 802 (9th Cir. 1980), *cert. denied*, 451 U.S. (1981); *Bakersfield City School District v. Boyer*, 610 F.2d 621, 628 (9th Cir. 1979).

The impracticability claim, however, is subject to the Tucker Act's implied restrictions on relief. It is concerned solely with rights created within the contractual relationship and has nothing to do with duties arising independently of the contract. As such, the impracticability claim is "founded . . . upon [a] . . . contract with the United States" and is therefore within the Tucker Act and subject to its restrictions on relief. *See Megapulse*, 672 F.2d at 967-968. If we were to construe § 702 to waive sovereign immunity on the impracticability claim, Congress' intent not to allow post-award declaratory relief on government contracts would be frustrated. The district court does not have jurisdiction of the impracticability claim.

One jurisdictional point remains. The government argues that a proviso in 28 U.S.C. § 1346(a)(2) divests the district court of jurisdiction over all of plaintiffs' claims, including the statutory claims. We disagree. Section 1346(a)(2) first grants the district courts jurisdiction over any "civil action or claim against the United States" not exceeding $10,000 that is founded upon a contract with the United States. This is followed by the proviso that the district courts shall not have jurisdiction over "any civil action or claim against the United States" founded on a contract subject to the Contract Disputes Act of 1978, 41 U.S.C. §§ 601 *et seq.* The government contends that the contracts at issue in this case are subject to the Contract Disputes Act of 1978, and that the proviso, because it uses the terms "*any* civil action or claim," divests the district court of jurisdiction over all actions relating to the contracts brought under any head of jurisdiction. Because the proviso is an integral part of § 1346(a)(2), we conclude that it restricts only the jurisdiction that is granted in the first part of § 1346(a)(2). Moreover, our conclusion that the statutory claim is not subject to the Tucker Act's remedial limitations rests on

the fact that the claim is not "founded upon a contract" within the meaning of § 1346(a)(2), but rather is based upon extra-contractual statutory obligations.

The district court has jurisdiction over the claim that enforcement of the contracts would violate 16 U.S.C. §§ 473-482 and the Multiple-Use Sustained-Yield Act of 1960, but does not have jurisdiction over the claim that the contracts are void for impracticability, frustration, or impossibility. Because the district court granted the injunction based on the impracticability claim and rejected the statutory claim, we vacate the judgment.

Because North Side's amended complaint makes only the impracticability claim, the district court on remand shall dismiss the complaint unless, in its discretion, it permits North Side to amend it. Plaintiffs-intervenors' statutory claim is remanded for further proceedings. We express no opinion on the viability of that claim.

After this case was argued and submitted, Congress enacted Public Law 98-478 which was signed by the President on October 16, 1984. This statute, popularly known as the Federal Timber Contract Payment Modification Act, substantially alters the economic environment out of which this litigation arose. We express no opinion upon whether the partial legislative remedy for some of the difficulties described in the complaint preempts judicial remedies under the pleadings as they stand, or as they may be amended upon remand.

Vacated and remanded.

[Filed Feb. 20, 1985. Phillip B. Winberry, Clerk, U.S. Court of Appeals]

BOOCHEVER, Circuit Judge, dissenting.

I respectfully dissent from the court's conclusion that the Tucker Act, 28 U.S.C. § 1346, (1982) impliedly forbids the granting of equitable relief and precludes the waiver of sovereign immunity for the claim that the Forest Service contracts were void under the doctrines of commercial impracticability, frustration of purpose and impossibility of performance.

The court's opinion is inconsistent with prior decisions of this court. In *Rowe v. United States,* 633 F.2d 799 (9th Cir. 1980), *cert. denied,* 451 U.S. 970 (1981), this court held that the Tucker Act does not preclude review of agency action when such relief is sought in addition to money damages. 633 F.2d at 802. The court reaffirmed this holding in *Laguna Hermosa Corp. v. Martin,* 643 F.2d 1376 (9th Cir. 1981), ruling that the Tucker Act does not impliedly forbid the issuance of a declaratory judgment. 643 F.2d at 1379.

The majority attempts to distinguish *Rowe* and *Laguna Hermosa Corp.* by construing them as cases not based on contract. The cases, however, contain nothing to justify such a narrow construction; in fact contractual rights were the fulcrum of both decisions. In *Rowe,* the plaintiffs claimed that the Secretary of the Interior was contractually bound to award leases to them. 633 F.2d at 800-01. It was essential, therefore, for the court to have jurisdiction over the contractual claims. *See also* 633 F.2wd at 803. In *Laguna Hermosa,* the plaintiff sought a declaratory judgment that it possessed contractual rights against the government. Although statutory rights were involved, the essence of the claim was the existence of a contract. *See* 643 F.2d at 1379. There is no suggestion in either case that jurisdiction is

limited to cases involving statutory claims. Moreover, the majority neglects to mention *Lehner v. United States*, 685 F.2d 1187 (9th Cir. 1982), *cert. denied*, 460 U.S. 1039 (1983). Lehner sought equitable relief, inter alia, because of the government's alleged breach of contract. We relied on *Rowe* and found that the Administrative Procedure Act, 5 U.S.C. § 702 (1982) waived sovereign immunity for the equitable claim. 685 F.2d at 1190.

Rowe, Laguna Hermosa and *Lehner* were based on the Tucker Act before it was amended by the Contract Disputes Act of 1978, 41 U.S.C. §§ 601 *et seq.* This amendment eliminated the district courts' concurrent jurisdiction previously granted by the Tucker Act over contract claims for less than $10,000.00. The Forest Service argues that the amendment eliminated the district court's jurisdiction over all government contract claims regardless of the type of relief sought. I agree with the majority that the amendment only eliminated the district court's Tucker Act jurisdiction over contractual claims for money damages. Equitable relief jurisdiction was not affacted.

Because I believe that the Tucker Act does not impliedly forbid the granting of equitable relief or preclude the waiver of sovereign immunity for claims founded on government contracts, I would hold that the district court had jurisdiction and would reach the merits of the contract claims other than for damages.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 83-490BU

NORTH SIDE LUMBER CO.,

Plaintiff,

v.

JOHN R. BLOCK, Secretary, United States Department of Agriculture; R. MAX PETERSON, Chief, United States Forest Service; JEFF M. SIRMON, Regional Forester for Region VI of the United States Forest Service; and LARRY A. FELLOWS, Forest Supervisor of the Siuslaw Forest,

Defendants.

OPINION AND ORDER

[December 23, 1983]

Carl R. Neil
Michael E. Haglund
LINDSAY, HART, NEIL & WEIGLER
111 S.W. Columbia, Suite 700
Portland, Oregon 97201

Alan I. Saltman
Thomas F. Spaulding
SALTMAN & STEVENS, P.C.
1700 "K" Street, N.W.
Washington, D.C. 20006

Attorneys for Plaintiffs.

Charles H. Turner
UNITED STATES ATTORNEY
District of Oregon
Jack G. Collins
ASSISTANT U.S. ATTORNEY
312 U.S. Courthouse
620 S. W. Main Street
Portland, Oregon 97205

Gary R. Randall
DEPT. OF JUTICE
Washington, D.C. 20530

Attorneys for defendants.

I

Timber is the lifeblood of Oregon's economy. This has been so since the earliest pioneers came to the state. By 1980, ninety-five thousand Oregon jobs depended directly on the forest industry. Lately, the industry is an ill humor, infecting the whole of the state's economy. The disease has spread to related industries ranging from logging supply and insurance to the local supermarket.

The Department of Agriculture and the Forest Service, as physicians in charge, have offered various potions. But none of the palliatives prescribed have effected a cure and the patient does not believe its physicians can ease its pain. And so, the patient—here, the North Side Lumber Company—pleads with a new healer—the Judge. But a judge, for reasons which lie deep in our history and tradition, is not necessarily equipped to play the healer's role. His scalpel may turn out to look and work, like a cleaver. Heavy-handed judicial intervention may be a "cure" which is worse than the malady. A judicial "cure" may, in the long run, kill the patient.

II

North Side is a small lumber company in Philomath, Oregon. It contracted for the right to harvest timber on land owned by the United States Forest Service. North Side does not want to harvest the timber because it cannot sell lumber for as much as it must pay for the timber. North Side asks this court to void fifteen of its contracts [1] because they are commercially impracticable to perform. North Side also claims that enforcement of the contracts would violate the Multiple-Use Sustained-Yield Act of 1960, 16 U.S.C. §§ 528 *et seq.* and the Organic Administration

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[1] See Appendix for a complete listing of the 15 contracts subject to this suit.

Act of 1897, 16 U.S.C. §§ 473 *et seq.* North Side moves for summary judgment on the merits, or in the alternative, it asks for a preliminary injunction preventing the Forest Service from enforcing the timber contracts pending trial on merits. The Forest Service moves for summary judgment, contending the district court does not have the authority to hear the case. For reasons discussed below, the motions for summary judgment are denied. North Side's motion for a preliminary injunction is granted.

To understand this controversy, the reader must first learn a little of Oregon's timber industry.

III

BACKGROUND

Oregon and Washington together comprise the single largest source of lumber and plywood in the United States. Over half the timber acreage in the western portion of these states is owned by the United States Forest Service and the Bureau of Land Management (BLM). The Northwest timber industry is composed of a few large companies and many medium to small locally owned companies like North Side. The large companies own and largely depend on their own timber lands. The smaller companies, on the other hand, are almost entirely dependent on the government for their supply of timber. Over eighty percent of the federal timber purchases are made by small businesses, purchasing over half the volume of federal timber sold. J. Crowell, Assistant Secretary for Natural Resources and Environment, U.S. Department of Agriculture, before the Subcommittee on Public Lands and Reserved Water, United States Senate 2 (Aug. 17, 1982). *See also,* Handy & Lilly, *Impracticability As Excuse From Performance on Contracts for Sale of Forest Service Timber,* 20 Willamette L. Rev.—(1984) [hereinafter Handy & Lilly]; Hampton & Wood, *Federal Timber Contracts: Who Will*

Bear the Ultimate Costs If Congress Denies Modification?, 19 Willamette L. Rev. 175, 177 (1983) [hereinafter Hampton & Wood].

The Forest Service, recognizing the disadvantage to small firms, has "set aside" some sales for small businesses. A Small Business Administration company (defined as one employing less than 500) gets an advantage in the "small business set aside sale." When the total timber sold in a ranger district in a given year has been purchased primarily by the large companies in excess of their historic share, this will trigger the "set aside" of a percentage for bid by SBA companies only. *See* Hampton & Wood, 19 Willamette L. Rev. at 177 n. 15.

The Forest Service Timber Sale Contracts are sold by bid, either at oral or sealed bid auction. 36 C.F.R. § 223.6 (1982). The Forest Service offers a specified tract of timber to the highest bidder. The purchaser, in exchange for the right to harvest the timber, pays the Forest Service and performs certain work required by the Forest Service, such as building the roads necessary for cutting and removing the timber. The contract provides that the timber must be harvested within a specified time, usually three years. Each tract is offered at a minimum appraised price (MAP). The MAP represents the Forest Service's estimate of the price an average producer could pay and still make a profit. The bidder willing to pay the largest amount over the MAP is awarded the contract.[2] Companies

[2] The system used to arrive at the MAP is standardized. It involves estimating the volume of the timber on the tract by species and quality, estimating the cost to remove, transport, and manufacture lumber out of the timber, and estimating the cost of performing work, such as road construction, in the sale area as required by the contract. Using the value of the final product, the Forest Service then calculates what amount a hypothetical purchaser could pay for the tract and still earn a profit of ten to fifteen percent.

are willing to pay more than the MAP, in part, because they are gambling that lumber prices will rise during the term of the contract.[3]

The outlook for the timber industry has undergone a substantial turnabout in the last decade. In the mid-1970s, the baby boom kids came of age and started buying houses. Inflation and the demand for lumber pushed timber prices up. Lumber companies saw the pot of gold at the end of the rainbow. At the same time, however, the companies feared that the pot would shrink. During the mid-1970s, lumber companies realized that newly-designated wilderness areas would lock up harvestable timber. The Forest Service's program of sustained-yield harvesting served to limit the amount of timber put on the market. Studies forecast declines in timber availability beginning in the mid-1980s.[4] With increasing demand and relatively decreasing supply, prices seemed certain to rise. Lumber companies like North Side took what looked to them like a reasonable gamble and bid high to ensure a share of the timber supply.

In late 1979, the Federal Reserve Board sought to reduce inflation by controlling the money supply. Interest rates promptly skyrocketed and the bottom fell out of the housing market. Demand for timber plummeted and pro-

[3] Companies will bid far over the MAP for other reasons. They may feel they are more efficient than the average purchaser and can cut their costs to perform each of the various tasks required by the contract. Also, the time lag of three years makes any bid a guess of what the future will bring. Not only could the timber market go up during that period because of increased demand and reduced supply, but also simple inflation could raise prices. Further, in fear of imminent shortages, a company would be willing to pay a premium to ensure a source of supply. Handy & Lilly, 20 Willamette L. Rev. at —— (manuscript at 11).

[4] J. Benter, K. Johnson & L. Scheurman, *Timber for Oregon's Tomorrow: An Analysis of Reasonably Possible Occurrences* (1976).

duct prices fell accordingly. The industry faced strong competition from cheaper Canadian lumber. Yet bid prices tended to remain relatively high because many in the industry assumed that recovery was not too far around the corner. They were wrong.

Recent Forest Service studies indicate the extent of the problem. An estimated eighty-eight percent of National Forest timber volume in Western Oregon and Western Washington has been sold at prices above the purchasers' current break even point. National Forest Timber Sales; New Timber Sales Procedures, 47 Fed. Reg. 2886, app. I at 11 (1982). One study found that as of June 30, 1982, there were 2,337 sales under contract, with a total uncut volume of 11.9 billion board feet. If housing starts were to move to the one million level by 1985, the study estimates 586 sales with 3.4 billion board feet would default. If housing starts were to move to the 1.5 million level by 1985, the number of defaults would decrease to 481 sales accounting for 2.4 billion board feet. Estimated cost to the Treasury under the two housing start and default estimates would be $900 million with one million starts and $600 million with 1.5 million starts. Timber Management and Policy Analysis Staffs, Forest Service, U.S. Dept. of Agriculture, Estimated Costs to the Federal Government of Several Forest Service Timber Sale Contract Relief Options Relative to the Cost of No Contract Relief 8 (Oct. 12, 1982).

IV

North Side is holding contracts most of which require it to pay the Forest Service approximately $225 to $500 per million board feet (MBF).[5] The most for which North

[5] The exact prices of North Side's contracts range from $228.05 per MBF (Fleece Taylor 77) to $511.17 per MBF (Scott Tissue 81). The average contract price per MBF is $350.16. The complete figures on each of the contracts are shown in the appendix.

Side could sell the cut lumber at the present time is about $230 per MBF.[6] The Forest Service granted North Side extensions on some of its contracts in 1980 and 1981 but unless renewed, those extensions will expire in 1984.[7] Even with the benefit of the extensions, North Side estimates that if it were to perform, it would lose $22 million. The company is worth only 1.5 million.[8]

After this suit was filed, the Forest Service approved a third extension program for timber sale contracts. The interim extension policy was published by the Forest Service on August 26, 1983, 48 Fed. Reg. 38,862 (1983); See also 48 Fed. Reg. 40,754 (1983). The final policy was published on December 7, 1983. 48 Fed. Reg. 54,812 (1983). Contracts sold prior to January 1, 1982, can be extended for five years beyond their current expiration dates on condition that the purchaser submit an acceptable and binding operation and payment schedule. Each company's

[6] The Pacific Northwest Coast Lumber Index figures for Doug' as Fir (coastal rate) were $229.07 per MBF in October, 1983 and $226.60 per MBF in November, 1983. This index is compiled by Western Wood Products Association, Yeon Building, Portland, Oregon (503) 224-3930.

[7] In May 1980, and again in October 1981, the Forest Service announced that all timber sales purchased between specified dates would be eligible for an extension of time for performance by their purchasers. These extensions are commonly referred to as "Soft I" and "Soft II."

[8] The Forest Service's evidence at the earlier hearing estimated North Side's potential losses at $11 million. That estimate assumed a profit of $600,000 on the Table 518 sale. Later the Forest Service admitted error stating that North Side would incur a *loss* of $44,000 from operating the Table 518 sale.

While the parties differ on the amount of loss, both agree that whatever the actual figure, it far exceeds North Side's net worth and performance of the contracts will put North Side out of business.

schedule must provide for proportionate harvesting over the five year period. Some flexibility in scheduling is permitted, but a purchaser cannot wait and harvest all of the timber at the end of the five years.

I had hoped that this long-awaited action by the executive branch would allow North Side to continue to operate its contracts and remain in business, thereby obviating any action on my part. To that end, I held a hearing in August, took additional testimony, and received added comments from the parties as to the effect on this case of the five-year extension plan. Unfortunately, the five-year extension will not solve North Side's problems. Even under the contract periods as extended, North Side will lose approximately $20 million on the fourteen sales in this case. If North Side fails to perform, upon default the Forest Service will rebid the sales. North Side must then make up the difference between its contract price and the rebid price, plus interest. Given the depressed market, paying the contract-market differential of even only a few of the fifteen sales will surely bankrupt North Side.[9]

V

The Department of Agriculture and the Forest Service have, on three occasions, granted extensions on timber sale contracts. In each case this limited relief was granted after they determined that it was in the substantial overriding public interest to do so. National Forest Management Act of 1976 § 14, 16 U.S.C. § 472a(c) (1982). Congress has not provided any relief so far. It is right and proper

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[9] Normally money damages alone are not irreparable injury. But money losses that threaten the existence of a company have been held sufficient irreparable injury to warrant a preliminary injunction. *Foremost International Tours, Inc., v. Qantas Airways, Ltd.*, 379 F. Supp. 88, 97 (D. Hawaii 1974), *aff'd* 525 F.2d 281 (9th Cir. 1975).

that relief for the timber industry come from the executive or legislative branches. The ailment suffered by the timber industry is part of the large scale societal illness afflicting the entire economy. The disease demands treatment. The executive and legislative branches have a surgical scalpel at their disposal to skillfully treat the disease. Yet they have left this patient to the judiciary, the branch of government that can wield only a meat cleaver in this area.

I strongly agree with Chief John Godbold of the Eleventh Circuit when he said:

> [T]here are some problems that are so *big* that they have no place in the federal court system. Let's take the question of whether a multimillion-dollar dam, or a multibillion-dollar waterway, should be built. These are questions of major importance, with environmental, social, political, emotional, scientific, and historical significance. There's one thing such a question is not—it's not a legal problem. More than that, if made a legal problem it will be entrusted to one judge or to three judges who have no special expertise in the matter. Also, it may be entrusted to them to decide on the basis of the peculiar format of whether the right words are on a piece of paper, an impact statement. That's a strange way to decide whether it is in the country's interest, after a balancing of all the separate interests affected, to build a multimillion-dollar dam. Not only is the forum wrong, the wrong question is asked. I would like to see us get out of this business—not because it's not important, but because there are other forums in which it can be settled better.

Chief Judge Godbold Suggests Ways To Improve the Courts of Appeals, Third Branch 6-7 (July 1983).

The courts should not play this role in society. But the parties are here in my court and, for the reasons explained below, I reluctantly conclude that I have jurisdic-

tion. I have no power to force the other branches to solve the problems of North Side and other companies like it. But it is clear that in the long run, the cure for this ailment will not be found in the courts.

VI

SUMMARY JUDGMENT (JURISDICTION)

The Forest Service has moved for summary judgment on the grounds that the district court was deprived of jurisdiction to hear this case when the Contract Disputes Act of 1978 amended 28 U.S.C. § 1346(a)(2). The determinative question is whether North Side is seeking a money judgment in the guise of claims for injunctive and declaratory relief. Money judgments in government contract claims can be obtained only in the Claims Court. Equitable and declaratory relief are available only in the district court except as indicated herein. 28 U.S.C. § 1491(a)(3); *Paragon Energy Corp. v. United States,* 645 F.2d 966 (Ct. Cl. 1981).

In *Laguna Hermosa Corp. v. Martin,* 643 F.2d 1376, 1378-79 (9th Cir. 1981) (Skopil, J.), a corporation sought a declaration that it had an enforceable contract with the United States. The court said that the district court had jurisdiction over Laguna Hermosa's claim for non-monetary relief even though it could later be the basis for a money judgment. In *Cape Fox Corp. v. United States,* 646 F.2d 399 (9th Cir. 1981), the court dismissed the plaintiff's claim for a "declaration" of damages on a *completed* contract. Because the contract was completed, the declaratory judgment action was really an action for a money judgment. Presumably, however, Cape Fox would have obtained declaratory relief if the contract remained to be performed. In that case, there would be ramifications beyond the payment of money. North Side fits this situation. North Side also seems to be the flip side of *Laguna Hermosa.* North Side wants a declaration that its contract

is unenforceable on the grounds of commercial impracticability.

The Forest Service argues that the Contract Disputes Act of 1978, 41 U.S.C. § 601 et seq. (Supp. III 1979), bars any relief in the district court. Until 1978, the Tucker Act, 28 U.S.C. 1346(a)(2), gave the district courts concurrent jurisdiction with the Claims Court of all contractural claims against the United States under $10,000. When exercising jurisdiction under the Tucker Act, the district court acted as a Claims Court and was limited to awarding damages. The Tucker Act was not the source of the district court's jurisdiction to grant injunctive or declaratory relief. *Lee v. Thornton,* 420 U.S. 139 (1975) (per curiam); *United States v. King,* 395 U.S. 1, 4-5 (1969); *Laguna Hermosa Corp.,* 643 F.2d at 1379; *Bakersfield City School District v. Boyer,* [illegible] F.2d 621, 628 (9th Cir. 1979). In government contract cases the district courts have always had the independent authority to grant injunctive and declaratory relief (provided, of course, there is a separate and independent source of jurisdiction) so long as the complaining party is not just trying to obtain money. *Id.; Laguna Hermosa Corp.,* 643 F.2d at 1379. The district courts retain this power because the Claims Court cannot exercise it.

In the Contract Disputes Act, Congress amended section 1346(a)(2) to read:

> the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978.

Contract Disputes Act of 1978, Pub. L. No. 95-563, § 14(a), 92 Stat. 2389 (1978).

The Forest Service reads this amendment to eliminate district court jurisdiction over all disputes governed by the Contract Disputes Act. There is language in the legislative history broad enough to support this reading:

> Section 10(a) [of S. 3178] is amended by allowing contractors with suits against the Government (excluding the Tennessee Valley Authority) to bring direct action only in the Court of Claims. U.S. district court jurisdiction is eliminated from Government contract claims. The committees believe that only one court jurisdiction is needed to handle direct action and that court should be the Court of Claims which historically has been the court of greatest expertise in Government contract claims. The committees are very sensitive to the workload pressures of the district courts and of their limited expertise in Government contract claims under the Tucker Act ($10,000 or less) and do not wish to burden the district courts with direct actions.

S.Rep., 95th Cong., 2d Sess. 10, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5235, 5244. However, the only power the district courts had under the Tucker Act was to adjudicate claims for money damages. Therefore, it follows that that is the only power which this amendment withdrew. The legislative history explains the amendment as a recognition that the district courts had limited expertise under the Tucker Act. *Id.* The legislative history does not discuss the district court's independent authority to grant injunctive and declaratory relief. Congress would have made a clearer statement if it intended to take away authority independent of the grant in the Tucker Act.

In addition, the Claims Court has not been given the power to grant equitable and declaratory relief that the district courts could otherwise grant. While both the House and Senate versions of the Contract Disputes Act included

broad provisions regarding declaratory judgments in the Claims Court, the language was not included in the version enacted into law. The Act amended 28 U.S.C. § 1491(a)(3) to authorize the Claims Court to grant injunctive and declaratory relief *before* the contract is awarded.

> To afford complete relief on any contract claim brought *before the contract is awarded,* the court shall have exclusive jurisdiction to grant declaratory judgments and such equitable and extraordinary relief as it deems proper, including but not limited to injunctive relief.

28 U.S.C. § 1491(a)(3) (emphasis added).

Once the federal agency awards the contract, the Claims Court may issue a declaratory judgment only where it is subordinate to a monetary award. *See Paragon Energy Corp. v. United States,* 645 F.2d 966 (Ct. Cl. 1981). Therefore, the district courts retain the power to grant injunctive and declaratory relief regardless of whether the subject contracts are subject to the Contract Disputes Act.

North Side's contracts state that they are subject to the Contract Disputes Act. Sections 8(g)(1) and 10(a)(1) authorize contractors to appeal decisions of contracting officers to agency boards of contract appeals or to the Claims Court. These procedures would apply in this case *if* North Side were pursuing a money judgment.[10] But the contracting officer, board of contract appeals, and the Claims Court do not have the authority to grant the re-

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[10] If these contracts were completed, North Side would have to go to the Claims Court for relief because it would be asking for money damages. That would be the situation if North Side could survive that long. But here the evidence shows that North Side will not survive performance of these contracts so as to be able to present its claims in the Claims Court. In such a situation, the district court may act.

quested relief. *Rough and Ready Timber Co.*, 82-1 B.C.A. (CCH) ¶ 15,493 (A.G.B.C.A. Dec. 28, 1981). Therefore, these sections are inapplicable here.

For the reasons stated above, I conclude I have jurisdiction of this case, and the Forest Service's motion for summary judgment is denied.

VII

SUMMARY JUDGMENT (MERITS)

North Side has moved for summary judgment on the merits of its complaint. For summary judgment to be entered in favor of North Side, it must show (1) that there is no genuine issue as to any material fact and (2) that it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56.

North Side fails on both counts. Some fact issues remain in this case, notably, the amount of damage North Side will suffer on each of the fifteen contracts from which it seeks to be excused. And North Side is not entitled to judgment purely as a matter of law, although it is a close question as indicated in section VIII below. North Side's motion for summary judgment is denied.

VIII

PRELIMINARY INJUNCTION

North Side seeks a preliminary injunction to prevent the Forest Service from enforcing its timber sales contracts. The traditional equitable criteria for granting preliminary injunctive relief are (1) a strong likelihood of success on the merits, (2) the possibility of irreparable injury to plaintiff if the preliminary relief is not granted, (3) a balance of hardships favoring the plaintiff, and (4) advancement of the public interest (in certain cases). *Los Angeles Memorial Coliseum Commission v. National Football League*, 634 F.2d 1197, 1200 (9th Cir. 1980). In this circuit

> the moving party may meet its burden by demonstrating either [1] a combination of probable success on the merits and the possibility of irreparable injury or [2] that serious questions are raised and the balance of hardships tips sharply in its favor.

Sports Form, Inc. v. United Press International, Inc., 686 F.2d 750, 753 (9th Cir. 1982); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 526 F.2d 86, 88 (9th Cir. 1975).

These tests are not separate but rather represent the outer reaches of a single continuum. "The critical element in determining the test to be applied is the relative hardship to the parties. If the balance of harm tips decidedly toward the plaintiff, then the plaintiff need not show as robust a likelihood of success on the merits as when the balance tips less decidedly." *Benda v. Grand Lodge of International Association of Machinists & Aerospace Workers*, 584 F.2d 308, 315 (9th Cir. 1978), *cert. dismissed*, 441 U.S. 937 (1979). "No chance of success at all, however, will not suffice." *Id.* The "irreducible minimum" is that the moving party demonstrate "a fair chance of success on the merits" or "questions . . . serious enough to require litigation." *Id; Sports Form*, 686 F.2d at 753.

A. Balance of Hardships

1. North Side

The harm to North Side if a preliminary injunction is denied will be more than substantial. North Side must harvest three contracts, Fleece Taylor 77, Prichard 208, and Sudan 005 and pay the contract prices by December 31, 1983. Other contracts terminate further in the future but require interest payments in the interim under their

Soft I and Soft II extensions.[11] North Side does not have the wherewithal to harvest and pay the contract price on the three contracts, or to make the interest payments due on many of the other contracts. North Side claims it will go out of business shortly after the end of this year if it is required to perform under these contracts.

North Side has the option under the recent five-year extension program, 48 Fed. Reg. 38,862, to extend many of its contracts over an additional five years. But that program requires that North Side harvest a proportion of the timber in each of those five years. In 1984 alone, North Side would lose approximately $3 million under the harvesting option most favorable to it and approximately $4 million under the harvesting option presented by the Forest Service. Over the course of the five-year extension North Side's losses would still exceed $20 million. These projected losses far exceed North Side's net worth and would put the company out of business. The Forest Service calculates North Side's losses as somewhat lower but does not really dispute that the losses will be several times greater than North Side's net worth.

The demise of North Side would also have serious effects on the town of Philomath, a community of about 2,500. North Side is the largest employer in the town, employing approximately 250 people. The company is a major purchaser from local suppliers and one of the leading taxpayers in Benton County.

2. Forest Service

On the other side, granting a preliminary injunction for this case alone would not significantly harm the Forest Service. The Forest Service stands to lose North Side's interest payments on some contracts and perhaps the con-

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[11] See appendix for termination dates.

tract price on the Fleece Taylor 77, Prichard 208, and Sudan 005 sales. These losses are not irreparable. Viewed in the context of the total number of timber sale contracts led by the Forest Service,[12] temporary loss of fifteen of these cannot significantly harm the Forest Service. Moreover, this injunction would only be in effect for the time needed to reach a decision on the merits. This further reduces the harm to the government.

In sum, the balance of the hardships tips decidedly toward North Side. Therefore, I look next to North Side's chances of success on the merits or the seriousness of the questions it raises.

B. Likelihood of Success on the Merits

North Side seeks to be discharged from its timber sale contracts with the Forest Service. To determine whether North Side raises serious legal questions or whether it demonstrates a fair chance of success on the merits, I must evaluate its arguments for discharge under the doctrine of commercial impracticability.

I begin this discussion with the general rule and maxim *pacta sunt servanda:* contracts are to be kept. A party is liable in damages for breach of contract even if he is without fault and if circumstances have made the contract less desirable or more burdensom than he anticipated. Only in extraordinary circumstances will a court depart from this general rule and grant relief to a party. The doctrine of commercial impracticability is perhaps the narrowest of all windows through which a party may escape its liability under the contract. Section 261 of the Restatement (Second) of Contracts defined impracticability as follows:

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[12] One study found that as of June 30, 1982, there were 2,337 sales under contract. Handy & Lilly, 20 Willamette L. Rev. at —— (manuscript at 8).

> *Discharge by Supervening Impracticability.* Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

Restatement (Second) of Contracts § 261 (1981).

The Uniform Commercial Code uses substantially similar language:

> Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:
>
> > (a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made . . . .

U.C.C. § 2-615(a) (1978).

One court set out the requirements as follows:

> The doctrine ultimately represents the ever-shifting line, drawn by courts hopefully responsive to commercial practices and mores, at which the community's interest in having contracts enforced according to their terms is outweighed by the commercial senselessness of requiring performance. When the issue is raised, the court is asked to construct a condition of performance based on the changed circumstances, a process which involves at least three reasonably definable steps. First, a contingency—something unexpected—must have occurred. Second, the risk of the unexpected occurrence must not have been allocated either by agreement or by custom. Finally, occurrence of the contingency must have rendered performance commercially impracticable.

Transatlantic Financing Corp. v. United States, 363 F.2d 312, 315 (D.C. Cir. 1966) (footnotes omitted).

1. *Contingency*

North Side must establish first that a contingency—something unexpected—occurred. Here, it claims that the market for timber products suffered a deep and prolonged decline. North Side argues that the Federal Reserve Board's decision to restrict the money supply caused the decline, and that this act was unexpected and unprecedented.

Yet the market by its very nature is unpredictable. In the late 1970s the economy was already in trouble. The exact steps the government would take to remedy the problems might not have been anticipated. But it was predictable that changes would be made. The effects of those changes were also unpredictable. Whenever the government sets out to tinker with the economy, the market feels the effects.

Under the Restatement (Second) of Contracts rule, the non-occurrence of this contingency must have been a basic assumption on which the contract was made. North Side argues that the three contract extension plans enacted by the Forest Service in 1980, 1981, and 1983, are admissions by the Forest Service that the market drop was unexpected. Acts taken to remedy a problem do not necessarily justify the conclusion that the problem was unexpected. The test under the doctrine of commercial impracticability examines the basic assumptions of the parties *at the time the contract was made.* Subsequent events such as the

Forest Service's remedial acts, do not figure into this analysis.

At the time the contracts were made, North Side bid and won its contracts because it wanted to make a profit. The Forest Service, at that time, expected the timber sales could be operated at a profit. I suppose one could say that a downturn in the market was a contingency the non-occurrence of which was a basic assumption on which the contract was made. But this argument goes too far. All contracting parties act under the "basic assumption" that they will profit from their contracts. A market downturn is exactly the contingency parties guard against by entering into long-term fixed-price contracts. It is not the type of "basic assumption" the non-occurrence of which can discharge a party under the doctrine of commercial impracticability.

2. *Allocation of Risk*

The second step in the analysis is whether the parties allocated the risk of the unexpected occurrence, either by agreement or by custom. Nothing in the standard timber sale contract provided for the risk of market changes.

The risks in contracts awarded by bid are customarily borne by the bidder. These timber sale contracts were all awarded by bid. Federal timber sales are advertised one month prior to the sale date. The notice of sale describes the location and area, lists the MAP set by the Forest Service, and urges bidders to make their own cruises of the area. A "cruise" is a trip through the forest area to estimate the volume and quality of a timber stand by looking at test plots or strips in the stand. Thus the bidder is in the best position to calculate its costs and the risks involved and bid accordingly.[13]

[13] Some companies faced with the same choices as North Side, saw the risk as too great. They either bid lower or not at all. Having guessed correctly that prices on the sales were simply not prudent, these companies have now gone out of business for lack of a timber supply.

3. *Commercial Impracticability of Performance*

The third element is whether occurrence of the contingency, here the market decline, rendered performance commercially impracticable. It is not possible to define a commercially impracticable performance in a pat phrase. The parameters of commercial impracticability are best defined by an examination of other cases.

North Side relies primarily upon four cases: *Aluminum Co. of America v. Essex Group, Inc.*, 499 F. Supp. 53 (W.D. Pa. 1980) (*Alcoa*); *Northern Corp. v. Chugach Electric Ass'n*, 518 P.2d 76 (Alaska 1974) (*Northern*); *City of Vernon v. City of Los Angeles*, 45 Cal. 2d 710, 290 P.2d 841 (1955); *Mineral Park Land Co. v. Howard*, 172 Cal. 289, 156 P. 458 (1916) (*Mineral Park*).

Mineral Park was one of the earliest cases to recognize the doctrine of commercial impracticability. There defendant agreed to extract and pay for gravel from plaintiff s property to construct a bridge. But excavations reached the water table when only half of the needed gravel had been removed. Sufficient gravel existed on plaintiff's land but it could only be taken and made usable at great expense, ten to twelve times the ordinary cost. The court concluded that performance was impracticable and excused defendant from performance:

> Where performance depends upon the existence of a given thing, and such existence was assumed as the basis of the agreement, performance is excused to the extent that the thing ceases to exist or turns out to be non-existent.

Mineral Park, 156 P. at 459.

The court read into the contract the parties' assumption that a sufficient quantity of gravel existed on the land available for use. In a practical sense, because of the high cost of removing it, the required amount of gravel was not available for use and defendant was not required to remove it. But the court cautioned:

> We do not mean to intimate that the defendants could excuse themselves by showing the existence of conditions that would make the performance of their obligation more expensive than they had anticipated, or which would entail a loss upon them.

Id. But the difference of ten to twelve times the original cost was sufficient to excuse defendant.

Another court used the doctrine of commercial impracticability to discharge plaintiff in *Northern Corp. v. Chugach Electric Ass'n.* There Northern contracted to repair the upstream face of a dam. The contract required Northern to quarry rock and haul it across a frozen lake to the dam site. Northern repeatedly attempted to perform but the lake was not sufficiently frozen to support the trucks and several were lost. Chugach continued to insist on performance of the contract as agreed. Another accident occurred in which lives were lost and Northern sued to be discharged. The court concluded that the contract was impossible to perform and discharged Northern.

This is not the same as North Side's situation. North Side has no physical impediment to its performance. It has not found the slopes to be too steep or the trees impossible to fell. It cannot be discharged by reliance on *Northern.*

North Side relies heavily on *Alcoa.* There Essex contracted to provide alumina to Alcoa for smelting; Alcoa was then to deliver the processed aluminum to Essex. The contract price was based upon a complex formula tied to the Whole-

sale Price Index for industrial commodities (WPI-IC) and other indices. During the course of the contract, oil prices rose dramatically and pollution control standards were tightened. These changes resulted in greatly increased electricity costs to Alcoa. Instead of reasonable profits for both parties, the carefully constructed contract resulted in profits for Essex and losses of $75 million for Alcoa. The court found that the "non-occurrence of an extreme deviation between the WPI-IC and Alcoa's non-labor production costs was a basic assumption on which the contract was made," and granted Alcoa relief. *Alcoa,* 499 F. Supp. at 72.

North Side points out that Alcoa stood to lose an amount less than 3% of its net worth, while North Side will lose $22 million, some 16 times its net worth of $1.5 million. But this argument ignores the factors distinguishing *Alcoa* and *Mineral Park* from this case and the wealth of cases in which relief on the grounds of commercial impracticability was denied.[14] The *Alcoa* court distinguished all the

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[14] Relief on the ground of commercial impracticability was denied in the following cases (this list is in addition to the cases cited in this opinion and I make no claim that it is exhaustive): *Bernina Distributors, Inc. v. Bernina Sewing Machine Co.,* 646 F.2d 434 (10th Cir. 1981); *Gulf Oil Corp. v. Federal Power Commission,* 563 F.2d 588 (3rd Cir.), *cert. denied,* 434 U.S. 1062 (1977); *Martin v. Vector Co.,* 498 F.2d 16 (1st Cir. 1974); *United States v. Buffalo Coal Mining Co.,* 345 F.2d 517 (9th Cir. 1965); *In Re Westinghouse Electric Corp.,* 517 F. Supp. 440 (E.D. Va. 1981); *Iowa Electric Light and Power Co. v. Atlas Corp.,* 467 F. Supp. 129 (N.D. Iowa 1978); *rev'd on other grounds,* 603 F.2d 1301 (8th Cir. 1979); *Eastern Airlines, Inc. v. Gulf Oil Corp.,* 415 F. Supp. 429 (S.D. Fla. 1975); *Publicker Industries v. Union Carbide,* 17 U.C.C. 989 (E.D. Pa. 1975); *Jennie-O Foods, Inc. v. United States,* 580 F.2d 400 (Ct. Cl. 1978); *Natus Corp. v. United States,* 371 F.2d 450 (Ct. Cl. 1967); *Maple Farms, Inc. v. City School Dist. of City of Elmira,* 76 Misc. 2d 1080, 352 N.Y.2d 784, 14 U.C.C. 722 (N.Y. Sup. Ct. 1974); *Elmira Lumber Co. v. Owen,* 96 Or. 127, 188 P. 415 (1920).

commercial impracticability cases denying relief on the grounds that the harm in those cases was not as great as the harm Alcoa would suffer by performing the contract. Yet the amount of financial loss is not the sole determinative factor. The contracts in each case differ in an important way. Alcoa and Essex worked long and hard, even invoking the aid of economist Allen Greenspan, to incorporate into their contract a pricing mechanism that would adjust for fluctuations in the market. They clearly intended to maintain profits for both parties in the event of changes in the cost of performance. Unfortunately a change in costs came from an unexpected and unprovided for source: OPEC and pollution control regulations. The parties' elaborate precautions came to naught.

North Side and the Forest Service took no such elaborate price control precautions. They made no attempt in these timber sale contracts to adjust for changes in the timber market. Changes in the market are exactly the "sort of risk that a fixed-price contract is intended to cover." *Restatement (Second of Contracts* § 261 comment d.

Mineral Park and *Northern* are also distinguishable from North Side's situation. In both those cases, it was the performance itself that was impracticable. The watery gravel and tbe watery grave would have been an obstacle to anyone, not just the parties to those contracts. North Side's primary claim is that if it is required to perform these fifteen contracts, it will not be able to continue in business. It makes no showing that these contracts would be impossible or impracticable for anyone to perform. But the standard for commercial impracticability is objective rather than subjective:

> *Subjective Impossibility Distinguished From Objective Impossibility.* Impossibility of performing a promise that is not due to the nature of the performance, but wholly to the inability of the individual promisor, neither prevents the formation of a contract nor discharges a duty created by a contract.

Restatement of Contracts § 455 (1932).

The rule was more recently stated in the Second Restatement:

> *"Subjective" and objective" impracticability.* It is sometimes said that the rule stated in this Section applies only when the performance itself is made impracticable, without regard to the particular party who is to perform. The difference has been described as that between "the thing cannot be done" and "I cannot do it," and the former has been characterized as "objective" and latter as "subjective." This Section recognizes that if the performance remains practicable and it is merely beyond the party's capacity to render it, he is ordinarily not discharged, but it does not use the terms "objective" and "subjective" to express this. Instead, the rationale is that a party generally assumes the risk of his own inability to perform his duty.

Restatement (Second) of Contracts § 261 comment e.

This distinction was emphasized by the court in *Peerless Casualty Co. v. Weymouth Gardens, Inc.*, 215 F.2d 362 (1st Cir. 1954), in which a builder defaulted on a contract to build houses. Due to the Korean war, prices had increased and some materials were unavailable. The court found that:

> dislocations in this country's economy caused by the Korean conflict made it impossible for the contractor to finish the houses *on time,* and thus excused it from that feature of the contract, but that it was the contractor's financial inability to cope with those economic dislocations which made it unable to complete the houses at all. Certainly unexpected increases in cost

> is a risk every contractor takes in entering into a fixed price contract like the one under consideration here. And an increase in costs caused by an unexpected outbreak of a war does not constitute the intervention of a superior force which ends the obligation of a valid contract by preventing its performance.

Id. at 364.

Completing the houses *on time* was objectively impossible and thus justified discharge from that requirement. But completing the houses *at all* was impossible only for *that builder*. Subjective impossibility did not justify discharge.

Similarly, in *B's Co. v. B.P. Barber & Associates,* 391 F.2d 130 (4th Cir. 1968), the court refused to discharge from its contract a company that was unable to lay pipe across a river. A more experienced company, using an entirely different method, succeeded at the job. The court stated:

> Impossibility of performance of a contract may be classified as objective impossibility (the thing cannot be done) or as subjective impossibility (I cannot do it). It is generally well settled that subjective impossibility, that is, impossibility which is personal to the promisor and does not inhere in the nature of the act to be performed, does not excuse nonperformance of a contractual obligation.

Id. at 137.

Pauley Petroleum Inc. v. United States, 591 F.2d 1308 (Ct. Cl.), *cert. denied,* 444 U.S. 898 (1979), is applicable to this case and the subjective-objective distinction. Pauley Petroleum was part of a consortium of oil companies which leased from the government submerged lands in the Santa Barbara Channel off California. The insurance market collapsed after an oil blow-out in the channel. Following the

disaster, the government imposed many new restrictions and regulations on oil drilling. Pauley sued the government claiming, that its leases were frustrated by the government's conduct following the blow-out. Other companies continued operations in the area but Pauley sought to "minimize this fact by asserting that only the 'major' oil companies could afford such risks, and the smaller companies like plaintiffs could not sustain the risk of drilling." *Id.* at 1319. The court however required an objective view and ruled that "the fact that the risk makes the contract unreasonable for a particular party is no excuse." *Id.*

Under an objective rule, North Side must show that these contracts are impracticable, not just for North Side, but for any timber company. North Side has proved that it will not survive if it is forced to perform these contracts. But there has been no evidence introduced to show that performance of these contracts would cause any company to fold.[15]

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[15] The Forest Service, in establishing its "Small Business set-aside sales" program discussed in section III, recognized a distinction between large timber companies and those like North Side with fewer than 500 employees. This distinction was established in recognition of the disadvantage to a Small Business Administration Company owning little of its own timber land, which must bid for federal timber against a large company that is not heavily dependent on federal timber and commits a relatively small proportion of its capital to such contracts.

Based on this distinction, an argument could be made that North Side should only be compared to other SBA companies; that is, rather than being required to prove these contracts impracticable for *any company,* North Side need only prove them impracticable for *any SBA company.*

Neither party raised this point and neither party introduced evidence to support such an argument. In any case, I reject the argument as it applies in this case. It is similar, but not identical to the argument that failed in *Pauley Petroleum,* 591 F.2d at 1319.

Like the house builder in *Peerless*, it is North Side's financial inability to cope with economic changes which makes it unable to perform these contracts. This inability to cope is personal to North Side. It is not that the contracts cannot be performed; it is that North Side cannot perform them due to its financial condition. North Side is in the same position as Pauley Petroleum; both are small companies financially unable to weather events that cause only an inconvenience to larger companies, *Pauley Petroleum*, 591 F.2d at 1319-20; *Peerless*, 215 F.2d at 364.

Neither is the threat of bankruptcy ordinarily a sufficient excuse for nonperformance. *Preuss v. United States*, 412 F.2d 1293, 1302 (Ct. Cl, 1969). Preuss, a government contractor, claimed that its default on a contract and bankruptcy were caused by the poor quality microfilm of plans supplied by the government resulting in increased costs of $275,000. The court refused relief, holding that it was Preuss' poor financial condition that rendered it unable to withstand the problems with the microfilm. Here it is North Side's financial situation and total reliance on government timber [which] renders it unable to withstand the market fluctuations.

The Ninth Circuit considered and rejected the defense of impracticability or impossibility in two recent cases. Although in each case the court was interpreting state law, their reasoning is instructive. In *Wagemann v. Montgomery Ward & Co.*, 713 F.2d 452 (9th Cir. 1983) (applying California law), the contract to lease real property tied the rent to property taxes. When California voters approved Proposition 13, Cal. Const. art. XIIIA, severely limiting property taxes, the lessors sought to rescind the lease based on the doctrine of frustration.[16] The court stated:

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[16] The contract doctrines of frustration, impossibility and impracticability are closely related and discussed interchangeably by some courts. For a discussion of the relationship among these doctrines, see *Alcoa*, 499 F. Supp at 70-73.

> All that has happened is that Proposition 13 has made the lease less profitable to the appellants than they anticipated it would be. Many acts of government frequently have a similar effect. That is not enough to excuse performance.

Id. at 454.

In *Taylor-Edwards Warehouse v. Burlington Northern*, 715 F.2d 1330 (9th Cir. 1983), the Ninth Circuit was interpreting Washington Law when it held that the impossibility doctrine did not excuse a railroad's agreement to maintain rail access to a warehouse even though the cost to do so was high.

It is important to point out thai in most of the cited cases, a party seeks relief because the cost of performing the contract has risen dramatically. That is not the situation in this case. North Side has not claimed that it will cost it more to perform these contracts. The costs of cutting, removing or processing the timber have not risen appreciably. The price that has changed is the price North Side can command when it resells the timber on the market. The Forest Service argues that changes in anticipated income from transactions after contract performance are irrelevant to a determination of commercial impracticability.

This technical view is supported by two cases in which something other than the cost to perform the contract changed. *Hancock Paper Co. v. Champion International Corp.*, 424 F. Supp. 285 (E.D. Pa. 1976), *aff'd without opinion*, 565 F.2d 151 (3th Cir. 1938); *Megan v. Updike Grain Corp.*, 94 F.2d 551 (8th Cir. 1938). Hancock Paper Company contracted to buy milk carton paper from Champion, mistakenly thinking it was buying Champion's entire supply. After performing this contract, Champion flooded the market with the rest of its paper, causing the market price to drop Hancock charged that Champion's marketing

of the rest of the paper was not foreseeable at the time of the contract. The *Hancock* court held:

> a drop in the market prices even if caused by one of the parties, is not a 'supervening impossibility" but is merely an "unanticipated difficulty" under the Restatement § 467 . . . As is clear from Illustration 1 to § 455, the lack of money from an expected source (here, Hancock's expected profits on resale) does not render performance impossible. Therefore, the unanticipated difficulties of resale do not excuse Hancock's performance. . . .
>
> The UCC Comments to § 2-615 specifically bar consideration of a decline in market price as "commercial impracticability," since "that is exactly the type of risk which business contracts made at a fixed price are intended to cover." Comment 4 [U.C.C.] § 2-615. Since both parties bargain for this risk as part of the contract, its occurrence does not alter any duties under it. This is exactly the situation in the case at bar. This Court finds that the problem of the depressed market, even though caused by Champion's marketing of [milk carton paper] (which is the view of the facts most favorable to the plaintiff) does not reach the level of severity required to excuse performance under either the Restatement or the UCC.

Id. at 290.

In *Megan*, the parties contracted for the rental of a grain elevator in Omaha when favorable rates and tariffs make [sic] it a profitable business. Then the railroads filed rates with the ICC that had the effect of diverting grain from the Omaha market. As a result, the elevator became practically worthless and its rental value was destroyed. The court held that:

> the immediate object of the contract, the use of the elevator, has not been frustrated. The elevator has not been destroyed; it still stands. . . . The frustration complained of relates to a more remote objective—the making of a profit out of the use of the leased premises. There is nothing in the lease indicating an agreement or understanding either that the rent shall be paid out of income or that the lease shall remain in effect only so long as the railroad rates and transit and service privileges shall remain unchanged.

Megan, 94 F.2d at 554.

The situation is much the same in this case. The realization of profit on a Forest Service timber sale contract is dependent on many factors which are as unpredictable as the market for timber products. *SDS Lumber Co. v. Allendale Mutual Ins. Co.*, 563 F. Supp. 608, 613 (D.Or. 1983). Weather, labor costs, hauling rates and foreign competition are a few of them. Loss of profits due to a sudden change in one of these factors is a risk assumed by the bidder on the contract and not by the Forest Service. Loss of profits caused by an unfavorable change in the timber products market should not be treated differently. If the market were just as suddenly to rise, these contracts could be operated at a profit. No matter how great that profit might be, the Forest Service could not share in it. North Side is similarly bound and must bear the consequence of its bids.

4. *Summary*

Summing up North Side's likelihood of success on the merits of its commercial impracticability claim, the cases generally supporting North Side's position are *Alcoa* and *Mineral Park*. In both these cases it was the cost of performance that changed, not the profits on resale as in North Side's situation. Yet even if I put aside that distinction and view North Side's "cost to perform" broadly to include its anticipated return on resale, these few cases are but "slender reeds" against which "blows a veritable

gale of judicial opinions." J. White & R. Summers, *Handbook of the Law Under the Uniform Commercial Code* 132 (2d ed. 1980). See cases cited in footnote 14.

However, that "slender reed" provides North Side with the "irreducible minimum" needed in the way of questions serious enough to require litigation or a bare chance of success on the merits to justify a preliminary injunction. This slender reed is perhaps only a touch more than no chance at all of success. In view of the handful of cases favoring this position, I find that North Side has "raised questions serious enough to require litigation." I am reluctant to encourage this argument when I believe its chances of ultimate success are small, but I cannot in good conscience, at the preliminary injunction stage, say that its chances of success are non-existent.[17]

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[17] North Side has made a second claim in this case based on the Multiple-Use Sustained-Yield Act (MUSYA) and the Organic Administration Act of 1897. However, neither party gave this claim much attention on paper or in court. Neither party cited any authority for its interpretation of these acts as applied to this case. I agree with the parties that this claim deserves little attention and I therefore dispose of it in this footnote.

North Side claims that the Forest Service policy of holding companies like North Side to its allegedly inoperable contracts violates its duty under these statutes to ensure a high level annual harvest of timber. MUSYA declares a national policy to manage national forest lands for multiple uses without impairing the long term productivity of those lands. 16 U.S.C. § 531. The Organic Administration Act of 1897 provides for the establishment of national forests. 16 U.S.C. § 475. The language in these statutes is of a most general nature. It directs the Secretary to consider certain goals in administering the national forests. I find no evidence to indicate that the Secretary did not consider the goals of the MUSYA and the Organic Administration Act and decide that they would best be met by enforcing timber contracts as altered by the three authorized extension programs. *Perkins v. Bergland*, 608

C. Summary

Since the balance of hardships tips so decidedly in favor of North Side and North Side has shown the irreducible minimum chance of success on the merits, the preliminary injunction is granted.

IX

CONCLUSION

At the earliest possible time, I will meet with the parties to determine the extent of further discovery the government feels it needs before the parties submit this case on the merits.[18] Due to the extent of testimony and documentation already presented by both sides at the hearings in July and August, I foresee this process will be short. Also at that conference North Side will submit a proposed form of preliminary injunction order and I will set the amount of security required under Fed. R. Civ. P. 65(c).[19]

F.2d 803, 806-07 (9th Cir. 1979); *Northwest Indian Cemetery Protective Ass'n. v. Peterson*, 565 F. Supp. 586, 606 (N.D. Cal. 1983).

[18] Throughout these proceedings North Side has expressed its satisfaction with the sufficiency of the evidence and has repeatedly asked that the hearing on the preliminary injunction be combined under Fed. R. Civ. P. 65 with a trial on the merits for a permanent injunction. Only the Forest Service contends that it needs more discovery.

[19] Although my grant of a preliminary injunction is appealable, counsel should give careful consideration to the efficacy or utility of an appeal at this stage in the proceedings given the predicted short time before a decision on a permanent injunction. This is one of those cases referred to by Judge Wallace in *Sports Form* where he questioned the value of appealing a preliminary injunction in such a situation where it would only result in unnecessary delay to the parties and inefficient use of judicial resources. Given

Both motions for summary judgment are denied and North Side's motion for preliminary injunction is granted. The foregoing constitute findings of fact and conclusions of law. Fed. R. Civ. P. 52.

IT IS SO ORDERED.

DATED this 23 day of December, 1983.

/s/ JAMES M. BURNS

Chief Judge United States District Court

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that the Ninth Circuit review of an order granting or denying preliminary injunction differs from review of an order involving permanent injunctive relief, appeal of this preliminary injunction may offer little guidance as to the Circuit's view of the merits. 686 F.2d at 753. I expect this case to be disposed of on the merits in far less time than it would take to process an appeal. I have little doubt that my decision on the merits will, in any event, be appealed to the Ninth Circuit.

APPENDIX

Contract Sale Name	Date of Award	Advertised Volume-DF	Original Termination Date	Extended Termination Date	Advertised Rates per MBF Douglas Fir (MAP)	Pltf's Bid per MBF Douglas Fir	WWPA Index for month of Award	WWPA Index April 1983
Table 518	08/16/77	9,000	12/31/82	12/31/84	157.09	302.36	213.91	241.03
Fleece Taylor 77	11/10/77	4,500	12/31/81	12/31/83	145.38	228.05	206.23	241.03
Siuslaw Cloud 78	15/12/78	11,700	12/31/82	12/31/84	163.97	294.88	250.77	241.03
Hanson Divide 78	05/05/78	10,800	12/31/82	12/31/84	167.32	269.74	250.77	241.03
Crab Buck 78	10/06/78	8,600	12/31/82	12/31/84	168.19	301.10	281.87	241.03
Westfork 79	05/17/79	8,700	12/31/82	12/31/84	150.05	318.05	309.16	241.03
Peterson 906	05/17/79	7,900	12/31/82	12/31/84	168.08	328.56	309.16	241.03
Pitchfork Lake 79	05/18/79	8,000	12/31/82	12/31/84	171.21	333.03	309.16	241.03
Howell 913	09/14/79	12,400	12/31/84	1	202.46	476.09	338.18	241.03

Sudan 005	04/29/80	6,400	12/31/83	[1]	161.02	490.15	266.80	241.03
•• 5/24/80 SOFT I PROMULGATED ••								
Camp Preacher 80	07/14/80	14,400	12/31/84	[1]	152.68	510.26	274.79	241.03
Scott Tissue 81	04/30/81	14,200	12/31/85	[2]	156.05	511.17	258.61	241.03
Chintimini Woods (I) 81	05/27/81	6,000	12/31/84	[2]	144.10	276.85	257.60	241.03
Denzer Crazy 81	06/26/81	7,900	12/31/84	[2]	171.88	347.62	254.62	241.03
•• 10/15/81 SOFT II PROMULGATED ••								
Prichard 208	01/13/82	6,900	12/31/83	[2]	136.78	258.00	228.80	241.03

[1] The Howell 913, Sudan 005, and Camp Preacher 80 contract termination dates may each be extended up to two years under Soft II without any showing of diligent performance upon an acceptable application by North Side.

[2] Any contract termination date not previously extended may be extended upon a showing of diligent performance if 75% complete.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 83-490

NORTH SIDE LUMBER CO.,
Plaintiff,

v.

JOHN BLOCK, Secretary of the United States Department of Agriculture; R. MAX PETERSON, Chief of the United States Forest Service; JEFF M. SIRMON, Regional Forester for Region VI of the United States Forest Service; LARRY A. FELLOWS, Forest Supervisor of the Siuslaw Forest,
Defendants.

ORDER

[Filed Jan. 11, 1984]

Plaintiff's motion for preliminary injunction is granted for the reasons set forth in my Opinion and Order issued on December 23, 1983. Therefore, on the giving of a bond or other security by plaintiff in the sum of $25,000, to be approved by this Court, defendants, their officers, agents, servants, employees, attorneys and those persons in active concert or participation with them, are enjoined and restrained from enforcing in any manner the 15 contracts at issue in this litigation.[1] During the pendancy [sic] of this

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[1] Table 518
Fleece Tylor [sic] 77
Siuslaw Cloud 78
Hanson Divide 78
Crab Buck 78

injunction, the rights and obligations of both plaintiff and defendants with respect to these contracts will be held in abeyance.

This order may be expanded in the future (as requested by plaintiff's proposed form of order) to include a 54-day extension of time from the dissolution of this order for North Side to submit to the Forest Service a 5-year plan pursuant to 48 Fed. Reg. 54,812 (1983). Fifty-four days is the time between December 23, 1983, when this injunction took effect, and February 15, 1984, the normal deadline for submitting a 5-year plan.

IT IS SO ORDERED.

DATED this 11 day of January, 1984.

/s/ JAMES M. BURNS
United States District Judge

Westfork 79
Peterson 906
Pitchfork Lake 79
Howell 913
Sudan 005
Camp Preacher 80
Scott Tissue 81
Chintimini Woods (I) 81
Denzer Crazy 81
Prichard 208

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 83-490BU

NORTH SIDE LUMBER CO.,
Plaintiff,

v.

BLOCK, et al.,
Defendants.

ORDER

[Filed Jan. 26, 1984]

This Order is issued to supplement my Order of January 11, 1984, in which North Side Lumber Co. was granted a preliminary injunction.

North Side is hereby granted thirty (30) days following the dissolution of the preliminary injunction to submit and have considered by the Forest Service a five-year plan pursuant to 48 Fed. Reg. 54,812 (1983). The parties have agreed to this extension and have further agreed that this Order should not provide for any adjustment of the contract dates of the fifteen contracts at issue in this case.

IT IS SO ORDERED.

DATED this 26 day of January, 1984.

/s/ JAMES M. BURNS
United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 83-490-BU

NORTH SIDE LUMBER CO., SUMMIT TIMBER CO., STEVENSON CO-PLY, INC., on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

JOHN BLOCK, Secretary of the United States Department of Agriculture; R. MAX PETERSON, Chief of the United States Forest Service; JEFF M. SIRMON, Regional Forester for Region VI of the United States Forest Service,

Defendants.

ORDER FOR PRELIMINARY INJUNCTION

[Filed Feb. 15, 1984]

Based upon the record, it is

ORDERED that defendants in the above-entitled action and each of them are enjoined (1) from enforcing in any manner the contracts at issue in this action held by the conditionally certified class members; (2) from enforcing the current February 15, 1984 deadline for the submission of a multi-sale extension plan by any of the conditionally certified class members that could include one or more of those timber sales in such a plan; and (3) to grant the members of plaintiffs' class 30 days following the dissolution of the preliminary injunction to submit and have considered by the Forest Service a five-year plan which could include one or more of the enumerated sales. This

Order does not provide for any adjustment of contract dates.

IT IS FURTHER ORDERED that defendants are enjoined in the same manner described above with reference to the contracts held by the following named 11 companies for a period of 14 days from this date to allow them to appeal denial of class member status and the same injunctive relief granted to members of the class:

1. Bohemia Inc.
2. Boise Cascade Corporation
3. Crown Zellerbach Corporation
4. Champion International Corporation
5. Georgia-Pacific Corporation
6. Louisiana-Pacific Corporation
7. Medford Corporation
8. Pope & Talbot, Inc.
9. Publishers Paper Co.
10. Southwest Forest Industries, Inc.
11. Williamette Industries, Inc.

IT IS FURTHER ORDERED that defendants are enjoined in the same manner described above with reference to the contracts held by the following named nine companies for a period of 14 days from this date to allow them to notify this Court that any such companies should be included conditionally as class members:

1. Boyd Lumber
2. Broughton Lumber
3. Frank Lumber
4. Ken Rogge Lumber
5. Linnton Plywood Assoc.
6. Menzies, Alex
7. Trail Timber/Rankin & Buc
8. Washington Loggers Corp.
9. Wasser & Winters

Plaintiffs are required to post a bond or other security in the sum of $50,000 to be approved by this court. This bond is in addition to the $25,000 bond required of North Side in the Order of January 11, 1984.

IT IS SO ORDERED.

DATED this 15 day of February, 1984.

/s/ JAMES M. BURNS
United States District Judge

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 83-490-BU

NORTH SIDE LUMBER CO., SUMMIT TIMBER CO., STEVENSON CO-PLY, INC., on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

JOHN BLOCK, Secretary of the United States Department of Agriculture; R. MAX PETERSON, Chief of the United States Forest Service; JEFF M. SIRMON, Regional Forester for Region VI of the United States Forest Service,

Defendants.

ORDER CONDITIONALLY GRANTING CLASS CERTIFICATION

[Filed Feb. 15, 1984]

Based upon the record, it is

ORDERED that plaintiffs' class action is certified conditionally as meeting the requirements of Rule 23 of the Federal Rules of Civil Procedure and shall be treated as a Rule 23(b)(2) class action. The class is certified conditionally to include 109 companies. That number includes the 128 companies listed in Exhibit "A" to plaintiffs' amended complaint and Hoquiam Plywood Co., Inc., with two exclusions.

The following publicly held companies are not included in the conditionally certified class:

1. Bohemia Inc.
2. Boise Cascade Corporation

3. Crown Zellerbach Corporation
4. Champion International Corporation
5. Georgia-Pacific Corporation
6. Louisiana-Pacific Corporation
7. Medford Corporation
8. Pope & Talbot, Inc.
9. Publishers Paper Co.
10. Southwest Forest Industries
11. Williamette Industries, Inc.

The following nine companies are not included in the conditionally certified class based upon notice to plaintiffs' counsel provided by wood products association executives:

1. Boyd Lumber
2. Broughton Lumber
3. Frank Lumber
4. Ken Rogge Lumber
5. Linnton Plywood Assoc.
6. Menzies, Alex
7. Trail Timber/Rankin & Buc
8. Washington Loggers Corp.
9. Wasser & Winters

Given the informality of this procedure, these nine companies shall have 14 days within which to notify this Court that they wish to be included in the class action.

IT IS SO ORDERED.

DATED this 15 day of February.

/s/ JAMES M. BURNS
United States District Judge

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 84-3657 and 84-3660

DC No. CV 83-490 BU

NORTH SIDE LUMBER CO., SUMMIT TIMBER CO., STEVENSON CO-PLY, INC., on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

and

BOHEMIA, INC., MEDFORD CORPORATION, SOUTHWEST FOREST INDUSTRIES, INC., BOISE CASCADE CORPORATION, CROWN ZELLERBACH CORPORATION, GEORGIA-PACIFIC CORPORATION, PENN TIMBER, INC., LOUISIANA-PACIFIC CORPORATION, PUBLISHERS PAPER CO., and WILLAMETTE INDUSTRIES, INC.,

Plaintiffs-Intervenors-Appellees,

v.

JOHN BLOCK, Secretary of the United States Department of Agriculture; R. MAX PETERSON, Chief of the United States Forest Service: JEFF M. SIRMON, Regional Forester for Region VI of the United States Forest Service,

Defendants-Appellants,

and

LANE COUNTY,

Defendant-Intervenor-Appellant.

Nos. 84-3661 and 84-3776

DC No. CV 83-490 BU

NORTH SIDE LUMBER CO., SUMMIT TIMBER CO., STEVENSON CO-PLY, INC., on behalf of themselves and all others similarly situated,

Plaintiffs,

and

BOHEMIA, INC., MEDFORD CORPORATION, SOUTHWEST FOREST INDUSTRIES, INC., BOISE CASCADE CORPORATION, CROWN ZELLERBACH CORPORATION, GEORGIA-PACIFIC CORPORATION, PENN TIMBER, INC., LOUISIANA-PACIFIC CORPORATION, PUBLISHERS PAPER CO., and WILLAMETTE INDUSTRIES, INC.,

Plaintiffs-Intervenors, Appellants,

v.

JOHN BLOCK, Secretary of the United States Department of Agriculture; R. MAX PETERSON, Chief of the United States Forest Service: JEFF M. SIRMON, Regional Forester for Region VI of the United States Forest Service,

Defendants-Appellees,

and

LANE COUNTY,

Defendant-Intervenor-Appellee.

ORDER

[Filed May 29, 1985]

BEFORE: FAIRCHILD*, GOODWIN, and BOOCHEVER, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc and an active judge requested a vote on whether to rehear the matter en banc. A majority of the active judges did not vote to allow rehearing en banc. (Fed. R. App. P. 35.)

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* The Honorable Thomas E. Fairchild, Senior United States Circuit Judge for the Seventh Circuit, sitting by designation.

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 84-3657
84-3660
84-3661
84-3776

DC# CV 83-490 BU
Oregon (Portland)

NORTH SIDE LUMBER CO., *et al.*,
Plaintiffs,

and

BOHEMIA, INC., *et al.*,
Plaintiffs/Intervenors-Appellants.

vs.

JOHN BLOCK, Secretary of the United States Department of Agriculture, *et al.*,
Defendants-Appellees,

and

LANE COUNTY,
Intervenor-Defendant/Appellee.

ORDER

[Filed June 13, 1985]

Before: FAIRCHILD*, GOODWIN, and BOOCHEVER, Circuit Judges.

Issuance of the mandate in this appeal is stayed for 30 days, pending the filing of a petition for certiorari with the United States Supreme Court. *See* Fed. R. App. P. 41(b).

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* Honorable Thomas E. Fairchild, Senior United States Circuit Judge for the Seventh Circuit, sitting by designation.

APPENDIX I

§ 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided,* That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

APPENDIX J

§ 1346. United States as defendant

(a) The district courts shall have original jurisdiction, concurrent with the United States Claims Court, of:

(1) Any civil action against the United States for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or any penalty claimed to have been collected without authority or any sum alleged to have been excessive or in any manner wrongfully collected under the internal-revenue laws;

(2) Any other civil action or claim against the United States, not exceeding $10,000 in amount, founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort, except that the district courts shall not have jurisdiction of any civil action or claim against the United States founded upon any express or implied contract with the United States or for liquidated or unliquidated damages in cases not sounding in tort which are subject to sections 8(g)(1) and 10(a)(1) of the Contract Disputes Act of 1978. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdic-

tion of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

(d) The district courts shall not have jurisdiction under this section of any civil action or claim for a pension.

(e) The district courts shall have original jurisdiction of any civil action against the United States provided in section 6226, 6228(a), 7426, or 7428 (in the case of the United States district court for the District of Columbia) or section 7429 of the Internal Revenue Code of 1954.

(f) The district courts shall have exclusive original jurisdiction of civil actions under section 2409a to quiet title to an estate or interest in real property in which an interest is claimed by the United States.

APPENDIX K

§ 1491. Claims against United States generally; actions involving Tennessee Valley Authority

(a)(1) The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Claims Court shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 10(a)(1) of the Contract Disputes Act of 1978.

(3) To afford complete relief on any contract claim brought before the contract is awarded, the court shall have exclusive jurisdiction to grant declaratory judg-

ments and such equitable and extraordinary relief as it deems proper, including but not limited to injunctive relief. In exercising this jurisdiction, the court shall give due regard to the interests of national defense and national security.

(b) Nothing herein shall be construed to give the United States Claims Court jurisdiction of any civil action within the exclusive jurisdiction of the Court of International Trade, or of any action against, or founded on conduct of, the Tennessee Valley Authority, or to amend or modify the provisions of the Tennessee Valley Authority Act of 1933 with respect to actions by or against the Authority.

APPENDIX L

A. Petitioners:

Alpine Veneers, Inc.*
Alsea Veneer
Anderson & Middleton
Arcata Lumber
Astoria Plywood
Avison Timber Co.
Bald Knob Land & Timber Co.
Barbee Mill Co.
Big Flat Timber
Boling, Sam
Boyd Lumber
Brazier Forest Products, Inc.
Burrill Timber Co./Eugene F. Burrill Lumber Co.
Buse Timber & Sales, Inc.
C&D Lumber Company
Cascade Resources
Cedar Lumber, Inc./Lyons Veneer
Claussen Timber Prod.
Clear Lumber Company
Cone Lumber
Cuddeback Lumber
Davidson Industries, Inc.
Dipaolo Logging
Douglas County Lumber
Evans Products
Fort Hill Lumber Company/Whipple & Moshofsky Lumber Company
Fort Vancouver Plywood Co.

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* Alpine International Company, a publicly-owned corporation, is the parent company of petitioner Alpine Veneers, Inc. Of the remaining 112 petitioners, however, none are publicly-owned companies or affiliates therewith.

Freres Lumber Co., Inc.
GMW Logging
Gates, J.R.
Gateway Lumber
Gem Lumber
Glenn T. Anderson, Inc.
Great Western Lumber
Gregory Timber Resources
Guy Roberts Lumber
H&W Logging Company
Hampton Tree Farms
Hanel Lumber Co., Inc.
Hanscom Bros.
Herbert Lumber
Hobin Lumber
Hoh River Timber
Hoot Owl Logging
Hoquiam Plywood Co., Inc.
Hoskins Lumber Co., Corp.
Hull-Oakes Lumber
Janicki Logging
Johnson Timber
Ken Rogge Lumber
Kogap Manufacturing
Lane Plywood, Inc.
Latimer & Sons, Inc.
Little River Lumber Prod.
Little Splinter
Lytle, Richard
Manke Lumber
Mayr Bros. Logging
Mazama Timber Prod.
McDougal Logging/Timber
Merrill & Ring, Inc.
Miller Shingle Co.
Moore Mill & Lumber
Mountain Fir Lumber

Taylor, J.W.
Tomco, Inc.
Trail Timber, Inc./Rankin & Buc
Triangle Veneer
Vanport Manufacturing, Inc.
W. S. Van De Grift
Wasser & Winters
Webco Lumber
Wilkins Kaiser & Olsen
Williams, George B.
Wilsonville Timber Co., Ltd.
Wm. Pearson Timber
Zip-O-Log Mills, Inc.

B. Publicly-Owned Companies Which Intervened Below:*

Bohemia Inc.
Medford Corporation
Southwest Forest Ind., Inc.
Boise Cascade Corporation
Crown Zellerbach Corporation
Georgia-Pacific Corporation
Penn Timber, Inc.
Louisiana-Pacific Corporation
Publishers Paper Co.
Willamette Industries, Inc.

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* Although these ten companies are parties to this proceeding under Sup. Ct. R. 19.6, they are not petitioners herein.

OPPOSITION

BRIEF

No. 85-59

In the Supreme Court of the United States

OCTOBER TERM, 1985

NORTH SIDE LUMBER CO., ET AL., PETITIONERS

v.

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

CHARLES FRIED
Acting Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

GARY RANDALL
MARTIN W. MATZEN
DIRK D. SNEL
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the jurisdictional constraints of the Tucker Act, 28 U.S.C. 1346(a)(2), bar a federal district court from adjudicating the claims of government contractors who seek only injunctive and declaratory relief excusing them from harvesting and paying for federal timber under Forest Service contracts.

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In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-59

NORTH SIDE LUMBER CO., ET AL., PETITIONERS

v.

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 753 F.2d 1482. The opinion of the district court (Pet. App. 13a-48a) is unreported.[1]

JURISDICTION

Judgment was entered in the court of appeals on February 20, 1985. Rehearing was denied on May 29, 1985 (Pet.

[1]This case was also the subject of a companion proceeding in this Court, entitled *Block* v. *North Side Lumber Co., et al.*, No. A-31, commenced on July 11, 1985, by the federal respondents named in the instant petition. On July 24, 1985, in that companion proceeding, Justice Rehnquist refused to vacate the stay of mandate issued by the court of appeals (Pet. App. 60a). Justice Rehnquist's order, which is reprinted at App., *infra*, 1a, has the effect of prolonging the preliminary injunction of the district court which—under the holding of the court of appeals—lacked jurisdiction to issue it, until this Court disposes of this case. See Fed. R. App. P. 41(b).

App. 59a). The petition for a writ of certiorari was filed on July 12, 1985. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This action involves contracts for the sale of timber in national forests located in western Oregon and Washington. These forests are managed by the United States Forest Service, which is authorized to enter into contracts for the sale of timber located therein (16 U.S.C. 472a, 528-538, 1600-1614). Contracts to harvest the timber in a specified area are awarded to the highest bidder (36 C.F.R. Pt. 223). The contract typically requires the purchaser to harvest the timber in a prescribed number of years (Pet. App. 16a).

In the mid-1970s, inflation and growth in the demand for lumber resulted in an increase in timber prices. Lumber companies believed that the supply of timber was decreasing and therefore raised their bids for government timber sale contracts. Demand for lumber fell sharply at the end of the 1970s, however, and lumber prices declined. The high bidders on the timber sale contracts found that they would incur substantial losses if they harvested the timber as required by their contracts. Pet. App. 17a-19a.

To ameliorate the financial difficulties of these timber purchasers, the Forest Service in December 1983 adopted a program allowing purchasers to obtain extensions of certain timber sale contracts (48 Fed. Reg. 54812 (1983)). This program delays for up to five years the deadline by which a purchaser must fully perform his obligations under his contract, thereby allowing the purchaser to delay harvesting the timber. The purchaser must submit to the Forest Service a timber harvest and payment schedule that requires periodic harvesting and payments over the extended life of the contract. The deadline for applications to participate in this program was February 15, 1984.

2. North Side Lumber Company brought this action in April 1983 in the United States District Court for the District of Oregon, seeking declaratory and injunctive relief invalidating 15 of its timber contracts with the Forest Service (Pet. 3-4). North Side asserted that it was entitled to relief under the "doctrine of commercial impracticability" because it would incur enormous losses as a result of the decrease in market prices for forest products if it was forced to harvest the timber (Pet. App. 4a, 18a-20a).[2]

On December 23, 1983, the district court issued an opinion granting North Side's motion for a preliminary injunction (Pet. App. 13a-48a). Rejecting the government's argument that it lacked subject matter jurisdiction, the court noted that the Claims Court did not have jurisdiction to issue declaratory and injunctive relief (Pet. App. 22a-26a). In assessing North Side's entitlement to preliminary injunctive relief, the court found that North Side had "perhaps only a touch more than no chance at all" of succeeding on the merits of its impracticability claim (*id.* at 44a).[3] The court concluded, however, that the balance of hardships "tip[ped] decidedly toward North Side" (*id.* at 29a). It found that North Side would be forced out of business if it was required to perform its contracts (*id.* at 27a-28a), and that the "temporary loss of fifteen [timber sale contracts] cannot significantly harm the Forest Service" (*id.* at 29a).

---

[2]North Side also asserted that the Forest Service's decision to enforce the timber sale contracts violated the Multiple-Use Sustained Yield Act of 1960 (16 U.S.C. 528 *et seq.*,) and 16 U.S.C. 473 *et seq*. See Pet. App. 4a.

[3]The district court rejected North Side's statutory claims (see note 2, *supra*), holding (Pet. App. 44a n.17) that there was "no evidence to indicate that the Secretary [of Agriculture] did not consider certain goals [of the statutes] and decide that they would best be met by enforcing timber contracts as altered by the three authorized extension programs." North Side deleted the statutory claims from the amended complaint it filed after the district court's decision (Pet. App. 4a n.2).

The court also observed that the preliminary injunction "would only be in effect for the time needed to reach a decision on the merits. This further reduces the harm to the government" (*ibid.*). The injunction issued by the court barred the Forest Service "from enforcing in any manner the 15 contracts at issue in this litigation" (Pet. App. 49a (footnote omitted)).

After the entry of the preliminary injunction, North Side filed an amended complaint with two additional named plaintiffs and sought relief on behalf of a class of 129 logging companies that were parties to 1,135 timber sale contracts with the Forest Service (Pet. App. 4a).[4] The district court "conditionally certified" a class of 109 companies (Pet. App. 55a-56a),[5] and issued a new injunction (Pet. App. 52a-54a) enjoining the Forest Service:

> (1) from enforcing in any manner the contracts at issue in this action held by the conditionally certified class members; (2) from enforcing the current February 15, 1984 deadline for the submission of a multi-sale extension plan by any of the conditionally certified class members that could include one or more of those timber sales in such a plan; and (3) to grant the members of plaintiffs' class 30 days following the dissolution of the preliminary injunction to submit and have considered by the Forest Service a five-year plan which could include one or more of the enumerated sales.

Id. at 52a.

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[4]The timber sales contracts involved are listed in Exh. A of the amended complaint, which was filed as App. F to our Application No. A-31. See note 1, *supra*.

[5]The district court refused to include 11 publicly held companies in the class, but granted the companies' motions to intervene. Ten of these companies appealed the court's refusal to bring them under the terms of the preliminary injunction (Pet. App. 4a; Pet. 5).

3. The court of appeals vacated the injunction, holding that the district court lacked subject matter jurisdiction (Pet. App. 1a-12a). The court observed that "the claims in this case are in essence against the federal government, and thus are barred by sovereign immunity unless the government has consented to suit" (*id.* at 5a (footnote omitted)). It rejected petitioners' claim that the Administrative Procedure Act, 5 U.S.C. 702, waived the government's sovereign immunity. The court noted (Pet. App. 5a-6a) that Section 702 states that it does not waive sovereign immunity "if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." It stated that the Tucker Act, 28 U.S.C. 1346(a)(2) and 1491, granted consent to suit on contract claims seeking money damages and therefore impliedly barred injunctive and declaratory relief for such claims. Since the impracticability claim was "concerned solely with rights created within the contractual relationship," and the Tucker Act limits the remedies for such claims, the court found that the waiver of sovereign immunity under Section 702 did not apply to petitioners' claim (Pet. App. 9a). It concluded that the district court lacked jurisdiction over the impracticability claim.[6]

Judge Boochever dissented. He stated that the Tucker Act does not impliedly forbid the granting of equitable relief and that Section 702 therefore waived sovereign immunity with respect to petitioners' claim. Pet. App. 11a-12a.

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[6]The court noted (Pet. App. 4a, 9a-10a) that the intervenors had raised statutory claims based upon the Multiple-Use Sustained Yield Act and the Organic Administrative Act, and concluded that these statutory claims were not barred by the Tucker Act's limited waiver of sovereign immunity. It stated that "[b]ecause North Side's amended complaint makes only the impracticability claim, the district court on remand shall dismiss the complaint unless, in its discretion, it permits North Side to amend it" (Pet. App. 10a).

The court of appeals denied a petition for rehearing and rejected a suggestion for rehearing en banc (Pet. App. 57a-59a). Petitioners moved for a stay of the mandate pending the filing of a petition for a writ of certiorari and the court granted the motion without opinion on June 13, 1985 (Pet. App. 60a). On July 24, 1985, Justice Rehnquist refused to vacate that stay (App., *infra*, 1a).

ARGUMENT

The court of appeals held that the waiver of sovereign immunity contained in the Administrative Procedure Act, 5 U.S.C. 702, does not extend to contract claims of the sort at issue here. This decision plainly is correct and does not conflict with any decision of this Court or any decision of another court of appeals. Accordingly, review by this Court is not warranted.[7]

Section 702 waives sovereign immunity for actions "seeking relief other than money damages" but provides that "[n]othing herein * * * confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." The Tucker Act, 28 U.S.C. 1346, 1491, grants consent to suits upon federal contracts, but generally limits the remedy to the award of money damages. *Richardson* v. *Morris*, 409 U.S. 464, 465 (1973); *United States* v. *King*, 395 U.S. 1, 4-5 (1969). Since this statute thus "impliedly forbids" declaratory and injunctive relief on contract claims, Section 702

[7]We note in addition that the practical importance of this litigation has been substantially reduced by the signing into law on October 16, 1984 (while this case was pending on appeal), of the Federal Timber Contract Modification Payment Act, Pub. L. No. 98-478, 98 Stat. 2213 *et seq*. The statute specifically provides relief for companies such as petitioners that purchased timber contracts at prices substantially above the timber's present market value. See S. Rep. 98-596, 98th Cong., 2d Sess. 4-5 (1984). It permits purchasers of contracts qualifying under the statute to obtain a release from up to 55% of their contracts for a buy-out fee of as little as $10 per thousand board feet, depending upon the purchaser's net book worth. See Pet. App. 10a.

does not waive sovereign immunity with respect to such claims. Cf. *Block* v. *North Dakota ex rel. Board of University & School Lands*, 461 U.S. 273, 286 n.22 (1983).

This conclusion is supported by the express legislative history of Section 702. The reports of both the House and Senate Committees state that "a statute granting consent to suit, *i.e.*, the Tucker Act, 'impliedly forbids' relief other than the remedy provided by the Act. Thus, the partial abolition of sovereign immunity brought about by this bill does not change existing limitations on specific relief, if any, derived from statutes dealing with such matters as government contracts." H.R. Rep. 94-1656, 94th Cong., 2d Sess. 13 (1976); see also S. Rep. 94-996, 94th Cong., 2d Sess. 12 (1976). The court below was right to follow this explicit congressional directive that Section 702 may not be used to circumvent the limitation of remedies contained in the Tucker Act.[8]

Moreover, the decision below is in accord with the decisions of the other court of appeals that has addressed the issue.[9] In *Spectrum Leasing Corp.* v. *United States*, No.

[8]Contrary to petitioners' implication (Pet. 6), this result does not deprive petitioners of a forum for their impracticability claim. First, they can raise the claim in any action for breach of contract brought by the government. Second, petitioners could seek a refund of their bid deposits in the Claims Court, arguing that the contracts should be rescinded because performance is impracticable. The court would address petitioners' argument in determining the propriety of a damage award. See *Pauley Petroleum Inc.* v. *United States*, 591 F.2d 1308, 1314-1317 (Ct. Cl.), cert. denied, 444 U.S. 898 (1979).

[9]*Rowe* v. *United States*, 633 F.2d 799 (9th Cir. 1980), cert. denied, 451 U.S. 970 (1981) and *Laguna Hermosa Corp.* v. *Martin*, 643 F.2d 1376 (9th Cir. 1981), relied upon by the dissenting judge in the court of appeals (Pet. App. 11a-12a), are inapposite because they concern claims that relate principally to statutory rights. *Lehner* v. *United States*, 685 F.2d 1187 (9th Cir. 1982), cert. denied, 460 U.S. 1039 (1983), upon which the dissenting judge also relied, did not address the relationship between the Tucker Act and the limited waiver of sovereign immunity contained

84-5371 (D.C. Cir. June 18, 1985), the court found (slip op. 4) that "[t]he Tucker Act * * * operates as * * * a limitation of section 702 in cases based on contracts with the federal government," and held that the district court therefore lacked subject matter jurisdiction over a government contract claim. See also *Megapulse, Inc.* v. *Lewis*, 672 F.2d 959, 967-969 (D.C. Cir. 1982).[10]

2. Even if the district court had jurisdiction, it should not have entered the preliminary injunction. The district court concluded that petitioners had "perhaps only a touch more than no chance at all of success" on the claim that their contracts should be invalidated because performance was impracticable (Pet. App. 44a). However, the court found that issuance of the injunction was appropriate because "the balance of hardships tip[ped] so decidedly in favor of North Side" (*id.* at 45a). This test plainly is inconsistent with the traditional requirement that a party seeking a preliminary injunction must show a likelihood of success on the merits. See, *e.g., University of Texas* v. *Camenisch*, 451 U.S. 390, 392 (1981). Indeed, petitioners' showing does not even meet the alternative standards adopted by some courts of appeals that require a lesser showing of success on the merits. See,

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in Section 702. In any event, any tension between those decisions and the decision below would constitute at most an intra-circuit conflict not warranting the intervention of this Court.

Petitioners' reliance (Pet. 9) on *United States* v. *John C. Grimberg Co.*, 702 F.2d 1362 (Fed. Cir. 1983) and *B. K. Instrument, Inc.* v. *United States*, 715 F.2d 713 (2d Cir. 1983), is similarly misplaced. Both of these cases were suits by disappointed bidders on federal contracts; as non-contractors, they obviously could not assert claims under the terms of those contracts.

[10]In our view the decision below could be sustained on the alternative ground—rejected by the court of appeals (Pet. App. 9a)—that the claim is barred by the amended Tucker Act (28 U.S.C. 1346(a)(2)), which precludes the district courts from exercising jurisdiction over "any civil action or claim against the United States founded upon any express or implied contract with the United States" that is subject to the Contract Disputes Act.

e.g., Golden State Transit Corp. v. *City of Los Angeles*, 686 F.2d 758, 759 (9th Cir. 1982), cert. denied, 459 U.S. 1105 (1983); see generally *Washington Metropolitan Area Transit Commission* v. *Holiday Tours, Inc.*, 559 F.2d 841, 843-844 (D.C. Cir. 1977). Since the district court correctly determined that plaintiff had only "a bare chance of success on the merits" of its impracticability claim (Pet. App. 44a), the granting of the injunction was improper.[11]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Acting Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

GARY RANDALL
MARTIN W. MATZEN
DIRK D. SNEL
Attorneys

AUGUST 1985

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[11]Although the court of appeals left the propriety of the statutory claims open on remand (Pet. App. 10a), the district court already has rejected them (Pet. App. 44a n.17). Those claims therefore cannot support injunctive relief.

DOJ-1985-08

APPENDIX

SUPREME COURT OF THE UNITED STATES

No. A-31

JOHN R. BLOCK, SECRETARY OF AGRICULTURE, ET AL. *v.* NORTH SIDE LUMBER CO., ET AL.

ON APPLICATION FOR STAY

[July 24, 1985]

JUSTICE REHNQUIST, Circuit Justice

The United States District Court for the District of Oregon preliminarily enjoined applicant John R. Block, Secretary of Agriculture, from enforcing contracts between him and respondent lumber company. These contracts required the latter to harvest timber in national forests. The Court of Appeals for the Ninth Circuit vacated the injunction holding that the Tucker Act, 28 U.S.C. §§ 1346 and 1491, impliedly barred the grant of such relief. The Court of Appeals stayed the issuance of this mandate for 30 days so that respondents might petition this Court for certiorari. The Secretary requests that I vacate that stay because of the prospect of continuing deterioration of abandoned timber on the ground. Respondents dispute this factual claim.

The District Court held that the "equity" favored respondents, and the Court of Appeals by staying issuance of the mandate even after vacating the injunction, must have agreed with the District Court on this point. The Secretary has furnished me no basis for disturbing their conclusion in this highly factual issue. The application is accordingly denied.

OPINION

EDITOR'S NOTE

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(3)

SUPREME COURT OF THE UNITED STATES

NORTH SIDE LUMBER CO. ET AL. *v.* JOHN R. BLOCK, SECRETARY OF AGRICULTURE, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 85–59. Decided October 21, 1985

The petition for a writ of certiorari is denied.

JUSTICE WHITE, dissenting.

This is a suit brought in Federal district court by various lumber companies who had contracted to purchase timber from the United States. The plaintiffs—petitioners here—seek both a declaratory judgment to the effect that the contracts are void as a matter of federal common law and an injunction restraining the United States from enforcing them. The district court granted preliminary injunctive relief, but the Court of Appeals for the Ninth Circuit reversed, holding that the district court lacked jurisdiction over petitioners' underlying claim for declaratory relief. Although conceding that such a suit arose under federal law for purposes of 28 U. S. C. § 1331, the court concluded that the Tucker Act, 28 U. S. C. §§ 1346 & 1491, impliedly barred the relief sought. The court reasoned that the Tucker Act, under which declaratory relief is not available, see *Richardson* v. *Morris*, 409 U. S. 464 (1973), defined the extent of the United States's waiver of sovereign immunity against the types of claims for which the Tucker Act authorizes monetary relief.[1]

[1] The Court concluded that the United States's general waiver of sovereign immunity against suits seeking relief other than money damages, 5 U. S. C. § 702, was inapplicable by virtue of its proviso, which states that "[n]othing herein . . . confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." The court concluded that the Tucker Act impliedly denied consent to suit for nonmonetary relief with respect to all cases involving claims of the type for which the Act authorizes damages actions.

Because, in the view of the Court of Appeals, the suit to void the contracts was a "claim against the United States . . . founded . . . upon [an] express or implied contract," 28 U. S. C. § 1346, the relief available was governed by the Tucker Act, and declaratory relief was therefore unavailable.

My doubts about the correctness of this ruling and its consistency with the decision of another Court of Appeals lead me to believe that review of the Ninth Circuit's conclusion in this Court is warranted. Even accepting the Court of Appeals' view that the Tucker Act impliedly bars declaratory and injunctive relief in all cases in which assertion of a claim of damages would require invocation of the Tucker Act,[1] the Court of Appeals' conclusion that petitioners' suit was a "claim against the United States founded upon a contract" is highly questionable. In fact, the claim is precisely the opposite of a claim founded upon a contract: it is a claim that no contract exists. At least one United States Court of Appeals has ruled the suits seeking declaratory judgments to the effect that valid contracts *exist* are not claims founded upon a contract for purposes of the Tucker Act. See *B. K. Instrument, Inc.* v. *United States*, 715 F. 2d 713, 726–728 (CA2 1983). If *B. K. Instrument* was correctly decided, it

[1]The Tucker Act also applies to claims for damages "founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department." 28 U. S. C. §§ 1346(a) & 1491(a). Thus, the Ninth Circuit's reasoning, if taken literally, would also bar a suit for injunctive or declaratory relief against officers of the United States government founded upon the Constitution, a federal statute, or a federal regulation, even if the claim for declaratory or injunctive relief was not accompanied by a claim for damages. Title 5 U. S. C. § 702, the provision of the Administrative Procedure Act waiving the United States's sovereign immunity against claims other than claims for money damages, would thus be rendered a dead letter. As the Second Circuit has observed, "[a] literal reading of the 'founded either upon' language of § 1491(a) would mean that all claims of wrongful action by federal officials involving more than $10,000 would have to be brought in the Claims Court—a result clearly in conflict with historic practice and with the intent of Congress . . . ." *B. K. Instrument, Inc.* v. *United States*, 715 F. 2d 713, 727 (1983).

would follow a fortiori that a federal common-law claim that a contract does *not* exist is not "founded upon a contract."

The Ninth Circuit's conclusion that a district court lacks jurisdiction to issue a declaratory judgment that a contract between a private party and the United States is void is problematic from another standpoint as well. Had petitioners breached their contracts rather than first seeking a declaratory judgment, the district court would have had jurisdiction under 28 U. S. C. § 1345 over an action for breach of contract brought by the United States as plaintiff. In such an action, petitioners could have raised as a defense their claim that the contracts were void as a matter of federal common law; and surely no one would argue that, were the defense valid, the district court would lack *jurisdiction* to declare the contracts void. Why, then, should similar relief be barred in a claim brought in anticipation of the breach? In both cases, the claim is in essence a defense to the Government's contractually based claim; and if petitioners' declaratory judgment action meets ordinary standards of ripeness and arises under federal law for purposes of 28 U. S. C. § 1331, I see no reason to hold that the relief that would be available to petitioners as defendants should be denied them as plaintiffs. In such instances, "[i]t is the nature of the controversy, not the method of its presentation or the particular party who presents it, that is determinative." *Aetna Life Insurance Co.* v. *Haworth*, 300 U. S. 216, 244 (1937). Cf. *Skelly Oil Co.* v. *Phillips Petroleum Co.*, 338 U. S. 667 (1950).[2] The contrary

[2]In *Skelly Oil*, the Court observed:

"Prior to [the Declaratory Judgment] Act, a federal court would entertain a suit on a contract only if the plaintiff asked for an immediately enforceable remedy like money damages or an injunction, but such relief could only be given if the requisites of jurisdiction, in the sense of a federal right or diversity, provided foundation for resort to the federal courts. The Declaratory Judgment Act allowed relief to be given by way of recognizing the plaintiff's right even though no immediate enforcement was asked." 339 U. S., at 671–672.

rule, as announced by the Ninth Circuit in this case, leaves a person who has contracted with the Government but who believes the contract to be void no choice but to breach the contract and assert his claim as a defense, thereby risking liability for damages. I had thought this was precisely the situation the Declaratory Judgment Act was designed to remedy.[4]

Concededly, this case does not at first glance appear to be one of great moment, and I certainly do not mean to express any view of the merits of petitioners' underlying substantive claims. Nonetheless, the Ninth Circuit's expansive reading of the Tucker Act as precluding a declaratory judgment as to the validity of a contract with the United States appears to be in tension with the law of the Second Circuit as well as with ordinary principles governing declaratory actions. I would grant certiorari to consider and resolve the jurisdictional issues this case presents.

Of course, the specific holding in *Skelly* was that a declaratory judgment as to the validity of a contract was unavailable where the only basis for federal subject matter jurisdiction was a federal-law defense to a state-law contract claim. This problem is not present here, as federal jurisdiction is not predicated solely on petitioners' asserted federal-law defense to the contract action. First, the "coercive action" that would be available for resolution of the issues presented—that is, the Government's claim for breach of contract—would be within the district court's jurisdiction by virtue of 28 U. S. C. § 1345. Second, the coercive action for breach of contract in this case would also arise under federal law for purposes of 28 U. S. C. § 1331, for "[t]he validity and construction of conracts through which the United States is exercising its constitutional functions, their consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any State." *United States* v. *County of Allegheny*, 322 U. S. 174, 183 (1944). See also *United States* v. *Seckinger*, 397 U. S. 203, 209–210; *Clearfield Trust Co.* v. *United States*, 318 U. S. 363 (1943).

[4] I do not mean to suggest that the Declaratory Judgment Act, 28 U. S. C. § 2201, itself constitutes consent to suit by the United States. I refer to the policies of the Act only insofar as they bear on the wisdom of construing the Tucker Act to render inoperative in cases of this type the waiver of sovereign immunity found at 5 U. S. C. § 702.